No. 84-571

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

HARRY N. WALTERS, Administrator of Veterans Administration; THE UNITED STATES OF AMERICA; THE VETERANS ADMINISTRATION; PAUL D. ISING, Director, Northern California Regional Office, Veterans Administration,
Appellants,

v.

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, a California non-profit corporation; SWORDS TO PLOWSHARES VETERANS RIGHTS ORGANIZATION, a California non-profit corporation; DON E. CORDRAY, an individual; ALBERT R. MAXWELL, an individual; REASON F. WAREHIME, an individual; DORIS WILSON, an individual,
Appellees,

and

AMERICAN G.I. FORUM, a national non-profit corporation,
Intervenor-Appellee.

Direct Appeal From the United States District Court For the Northern District of California

BRIEF FOR APPELLEES

ROBERT D. RAVEN
GORDON P. ERSPAMER*
MICHAEL F. RAM
MORRISON & FOERSTER
One Market Plaza
Spear Street Tower
San Francisco, CA 94105
Telephone: (415) 777-6000
Attorneys for Appellees

**Counsel of Record*

QUESTIONS PRESENTED

The question presented by appellants is not properly framed in that it fails to mention the as-applied nature of appellees' constitutional challenges and the abuse of discretion standard of review applicable to preliminary injunctions. The questions presented are properly framed as follows: Did the district court abuse its discretion in holding:

1. That appellees were likely to succeed on the merits of their claim that, as applied, 38 U.S.C. Sections 3404-05, which prescribe a $10 maximum attorney's fee a veteran may pay an attorney from his/her own funds to represent the veteran in connection with service-connected death and disability compensation claims and impose criminal sanctions (the "fee limitation"), violate their procedural due process rights in light of the district court's factual findings.

2. That appellees were likely to succeed on the merits of their claims that the fee limitation, as applied, violates their First Amendment rights to meaningful access to the VA adjudication system in light of the district court's factual findings.

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Cases

TABLE OF AUTHORITIES CITED

CASES

TABLE OF AUTHORITIES CITED
CASES

TABLE OF AUTHORITIES CITED
CASES

TABLE OF AUTHORITIES CITED
CASES

TABLE OF AUTHORITIES CITED
CASES

Table of Authorities Cited

Constitution, Statutes, Regulations and Rules

Table of Authorities Cited

Constitution, Statutes, Regulations and Rules

Legislative Materials and Other Authorities

TABLE OF ABBREVIATIONS

I. BRIEF AND OTHER FILINGS

Title	Abbreviation
Record	R
Jurisdictional Statement filed October 9, 1984	JS
Jurisdictional Statement, Appendix A (District Court Opinion)	Op.
Appellees' Motion to Affirm filed November 14, 1984	MA
Joint Appendix dated December 10, 1984	JA
Brief for Appellants dated January 1985	BFA

II. DECLARATIONS AND AFFIDAVITS

Name	Description	Abbreviation
Bitzer, Ronald M.	Claims Agent	Bit.
Caron, Martha L.	Attorney	Caron
Cordray, Don E.	SCDD recipient	Cor.
Dempsey, Lola	SCDD applicant (widow)	Demp.
Derhagg, James J.	Special Assistant to BVA Chairman	Der.
Gretenhart, Frederick H.	Attorney (Swords to Plowshares)	Gret.
Miles, Herbert	Attorney (Swords to Plowshares)	Miles
Ram, Michael F.	Attorney	Ram
Siemers, Steven W.	Attorney	Siem.
Stavick, Margaret	Attorney, PTSD claims	Stav.
Turcotte, Thomas W.	Attorney	Tur.
Udall, Stewart L.	Attorney	Udall

III. AGENCIES, COMMITTEES, PROCEDURAL TERMS

Title	Abbreviation
Board of Veterans Appeals	BVA
Disabled American Veterans (*amicus curiae*)	DAV
House Veterans Affairs Committee	HVAC
National Association of Radiation Survivors	NARS
Notice of Decision	ND
Notice of Disagreement	NOD
Post-traumatic stress disorder	PTSD
Substantive Appeal	SA
Service-connected death and disability compensation	SCDD
Senate Veterans Affairs Committee	SVAC
Statement of the Case	SOC
Swords to Plowshares	Swords
Veterans Administration	VA

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STATUTES AND REGULATIONS INVOLVED

See Appendix H hereto.

STATEMENT OF THE CASE

I. THE NATURE OF THIS ACTION

This is an appeal of a preliminary injunction entered June 12, 1984, in this action by three disabled atomic veterans and an atomic veteran's widow and two non-profit organizations, the National Association of Radiation Survivors ("NARS") and Swords to Plowshares Veterans Rights Organization ("Swords"), challenging the constitutionality of the $10 attorney's fee limitation applicable to VA service-connected death and disability compensation ("SCDD") claims.[1] The fee limitation prohibits veterans from paying an attorney more than $10 from

[1] NARS is comprised principally of survivors of the atomic bomb testing program, including many SCDD recipients. Swords is a VA

their own funds to advise or represent them, and imposes criminal penalties. After extensive discovery and briefing, the district court issued a preliminary injunction, making detailed factual findings that are summarized below. Applying the traditional preliminary injunction analysis, the district court rested its ruling concerning probability of success on the merits on two independent legal grounds—that the fee limitation, as applied, violated appellees' rights to procedural due process and their First Amendment rights to meaningful access to the VA adjudication system.

II. BASIC DESCRIPTION OF VA ADJUDICATION SYSTEM

VA does not dispute the district court's findings regarding irreparable injury and balance of hardships. VA addresses only limited aspects of the factor of probability of success on the merits. First, VA argues, contrary to an extended line of decisions requiring deference to the factual findings below, that the "factual proceedings in the district court are irrelevant." (BFA 22). Indeed, VA's brief is devoid of citation to the extensive record below, and VA does not dispute that the record supports the district court's findings. Second, having so readily disposed of the district court's express factual findings and record, VA asks the Court to substitute a different "record" based upon a hodgepodge of selected excerpts from unsworn statements of VA officials before legislative committees and Senate committee reports concerning bills that died in House committee.[2] VA

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accredited service organization serving Vietnam veterans and specializing in SCDD claims caused by stress or arising out of exposure to Agent Orange. Appellees refer the Court to the Statement of the Case in the *amicus curiae* brief filed by the National Association of Atomic Veterans for the facts concerning the claims and circumstances of the individual appellees.

[2] VA, of course, had extensive opportunity below to counter appellees' factual showing. It chose not to do so. An appellant's obligation is to set forth the facts upon which it bases its appeal in its opening brief, allowing appellee an opportunity to respond. VA did not do so, but purported to "reserve" the opportunity to "respond" to appellees' "factual submissions" drawn from the record in its reply brief "to the extent it proves necessary to this Court's understanding of the case. . . ." (BFA 35 n.35). To allow VA to do so would be unfair to appellees, who will have no opportunity to respond.

neither presented any of this material nor raised any argument concerning it below. Moreover, the conclusions VA draws from these selected legislative excerpts often directly conflict with express findings of the district court. For example, the district court expressly found that access to retained counsel was necessary to a fair procedure (Op. 38a); VA, however, consistently claims to the contrary. (BFA 15, 17, 19). Similarly, the district court found that "representation" by lay service representatives was inadequate (Op. 32a, 33a, 36a-38a); yet VA insists upon describing such representation as "adequate," even "expert." (BFA 17, 26). As the discussion below demonstrates, the district court's findings of fact, based upon the actual operation of the VA adjudication system, are crucial to its holding that appellees were likely to succeed on the merits of their claims that the fee limitation, as applied, violates their procedural due process and First Amendment rights. As unpalatable as VA finds the "factual proceedings" below, it is the district court's findings upon which its appeal must depend. The following summary of the VA adjudication system is based upon the district court's findings of fact and uncontroverted facts below.

In contrast to the basic pension benefits available between the Civil War and the New Deal, application for which merely required clerical assistance (MA App. E; App. I), a variety of veterans benefits now exists, including SCDD. SCDD is analogous to Social Security disability benefits and worker's compensation, and involves

> payment for an injury . . . or death following from official duties in service. And the government has an obligation to compensate for that injury. It's a payment in lieu of what would have been continued in service. . . . The amount compensated in a disability is supposed to be an amount equal to . . . what would be anticipated as lost wages from that type of injury in the civilian labor fields. . . .

(JA 378; *see also* JA 457-58). Each of the SCDD authorizing statutes lists the requirements for awarding compensation under the heading "Basic entitlement" and expresses that entitlement

in mandatory terms. 38 U.S.C. §§ 310, 321-22, 331, 341-42; (App. H 80a-83a). The veteran possesses the burden of proof to establish active duty military service, a discharge other than dishonorable, and a service-connected disability that was not the result of his or her own willful misconduct. 38 U.S.C. § 101; 38 C.F.R. §§ 3.102, 3.12-3.15.

Initial SCDD claims are made to one of fifty-seven VA regional offices. A veteran must "submit evidence sufficient to justify a belief in a fair and impartial mind that [the] claim is well grounded." 38 C.F.R. § 3.102. "The development of a factual record at the regional level is the most crucial aspect of a new claim, since the VA decision rests on this record." (R 73 Ex. 70 at 70). Veterans theoretically may obtain a hearing "at any time on any issue" and a hearing transcript, may present witnesses and submit documentary and other evidence, and may appeal adverse VA decisions to the Board of Veterans Appeals ("BVA"). 38 C.F.R. § 3.103; (R 78 Ex. 19 at 105). In most cases, a three-member "rating board," consisting of medical, legal, and occupational "specialists," reviews the veteran's submissions, and prepares a "rating" either granting or denying the claim. *See* 38 U.S.C. § 355; (*e.g.*, R 71 Exs. 30, 34, 37; R 76 Exs. 161, 165). A regulation requires the rating board to cast "reasonable doubt" in favor of the veteran. 38 C.F.R. § 3.102. However, VA adjudicators construe the reasonable doubt standard to require the claimant to show "a probability of entitlement." (JA 277; *see also* JA 462-63, 466; R 157 at 31-32). Rating boards use a complicated schedule for rating disabilities which prescribes specific disability percentages for thousands of conditions. 38 C.F.R. §§ 4.1-4.150. For example, the rating schedule assigns a 50% rating for loss of an area of the skull larger than a 50-cent piece without a brain hernia. 38 C.F.R. § 4.71(a)(5296).

VA claim denials are communicated in a computer notice called a Notice of Decision ("ND"), which perfunctorily expresses a denial without factual findings or explanation. (JA 95, 386; *see also* JA 609; R 71 Ex. 21). The VA maintains no statistics as to SCDD outright denial rates. However, an informal tally by the Northern California Regional Office disclosed a denial rate of 60% for all VA benefit claims. (R 143 at 164).

Also, many successful SCDD applicants disagree with the percentage disability rating VA assigns. (JA 387). Failure of proof is a frequent basis for denial of SCDD claims. (JA 223-24, 609). To challenge an adverse decision, a veteran must file a "Notice of Disagreement" ("NOD") within one year. 38 U.S.C. § 4005; 38 C.F.R. §§ 19.118, 19.119(a). If VA declines to reconsider upon receiving the NOD, it prepares a "Statement of the Case" ("SOC"), framing the issues for appeal. (R 158 at 303). The SOC summarizes the decision, factual record, and applicable law, 38 C.F.R. §§ 19.119(b), 19.120, and constitutes the regional office's final decision. (*See, e.g.*, R 70 Exs. 167 at 101-05, 168 at 135-41). "If the claimant takes no action to follow up on the NOD (which is frequently the case), the file is closed." (JA 555; *see also* JA 590-97).

VA regulations have many procedural requirements which are pitfalls for the unwary, such as jurisdictional time limitations. *See* 38 C.F.R. §§ 19.119(a), 19.126; (JA 193-94). To perfect the appeal, the veteran must file a substantive appeal ("SA") within sixty days from the date the SOC is mailed. 38 C.F.R. § 19.129(b). The SA must "set out specific arguments relating to errors of fact or law." 38 C.F.R. § 19.123(a). SAs failing to satisfy these requirements are subject to summary dismissal. 38 U.S.C. § 4005(d)(5); 38 C.F.R. § 19.126. The veteran is conclusively presumed to agree with every statement of fact contained in the SOC to which no exception is taken in the SA. 38 C.F.R. § 19.121(b)(3). The district court found that "[v]eterans' failure to comply with the VA's procedural regulations may result in denial of their claims." (Op. 30a).

When an SA is filed, the original claim file is sent to BVA in Washington, D.C. for decision. (R 158 at 354-55; *see also* R 158 Ex. 87). Argument and testimony may be presented to a BVA panel, 38 C.F.R. § 19.182, but fewer than 5% of BVA appeals result in personal hearings. (JA 555). The remainder of BVA appeals are resolved upon the written record transmitted by the regional office, together with a short written statement of the veteran's contentions. (*Id.*). BVA "will not require the appearance of any Veterans Administration official or other person" at BVA hearings. 38 C.F.R. § 19.165(a). BVA is bound by VA regulations, instructions of the VA Administrator, and precedent

opinions of the VA general counsel. 38 U.S.C. § 4004(c). BVA reverses regional office decisions in 13% of perfected appeals, and remands an additional 15% for the development of further evidence. (JA 584; R 157 at 134-35).

The district court found that SCDD claims often present complicated questions concerning the degree of disability, service connection, and causation and that "[b]oth the procedures and the substance entailed in presenting SCDD claims to the VA are extremely complex." (Op. 30a-31a). VA conceded that "the claims process is a very complicated process . . . ." (JA 426). VA rules, regulations, and procedures concerning SCDD are set forth in multiple sources and are intricate and extensive, comprising many thousands of pages. These sources contain complicated rules and procedures concerning available benefits, claims development, eligibility, ratings, computations, elections, presumptions, severance, fraud, forfeitures, recoupment, appeals, and a host of other subjects.[3] Most procedural and substantive rules are not promulgated as part of any rule-making procedure and are unavailable to veterans. A recent government study concluded: "Veterans law consists of a large and relatively complicated body of statutes and regulations that is overwhelming to legal services staff not required to deal with it regularly." (JA 553; *see also* JA 476-77; R 66 Siem. Decl. ¶3; R 71 Ex. 21; R 157 at 46). Substantive or procedural rules from different VA

[3] These sources include the Procedural Manual M-21-1 (JA 511), BVA Manual (R 71 Ex. 45), Program Guide 21-2 (R 78 Ex. 19), circulars (*e.g.*, R 72 Exs. 3, 5); Field Appellate Procedures Manual M1-1 (R 76 Ex. 150), adjudication memoranda (JA 413; R 158 Ex. 85); "informal" memoranda (*e.g.*, JA 436-39, 512-13), precedent opinions of the general counsel (JA 368), and BVA decisions (*e.g.*, R 76 Ex. 159). *See also* 38 C.F.R. At least one VA regional office recently purchased a computer to attempt to keep track of these multiple sources. (JA 393-94). "That's the basic point that we have many directives. And it's a matter of knowing all of them that pertain to a particular point. So it behooves one to keep a cross index. But they are one as binding as another." (JA 418). "[A]rbitrary and unpublished changes in these rules place any individual veteran without representation at an unfair disadvantage." (R 66 Miles Decl. ¶ 5). Many of the VA's regulations and procedures have no clear statutory basis. (R 72 Ex. 114 at 26).

sources may conflict, and misapplication of presumptions by VA adjudicators is a persistent problem. (JA 247-49, 259-60, 401-11, 425-26, 476-77; R 66 Siem. Decl. ¶3; R 67 Stav. Aff. ¶5; R 71 Ex. 21; R 157 at 46).

The district court found that extensive investigation, documentation, legal analysis, and preparation are necessary to mount convincing SCDD claims, and that the services of attorneys are essential. (Op. 26a-36a, 39a). (Despite these express findings, VA repeatedly and baldly states that "retained counsel is not necessary to a fair procedure." (BFA 15, 17, 19)). Most veterans are unacquainted with VA substantive and procedural rules, and are ill-equipped to investigate and prepare their claims, utilize rights to offer documentary evidence, present causes at hearings, exercise appellate rights, and exhaust administrative remedies. (JA 144-45, 170-71, 193-94, 386, 392-93, 434; R 66 Siem. Decl. ¶4, R 141 Demp. Decl. ¶7). Unrepresented veterans encounter great difficulties in prosecuting SCDD claims. (*E.g.*, R 74 Ex. 102). An experienced BVA attorney observed: "[P]eople that don't have representation . . . generally don't have the wherewithal on how to develop their claim . . . . How are they going to know VA procedure? They many times don't really get all their medical records, service medical records. I don't think they do as well generally when they represent themselves." (R 149 at 18). A VA rating board member conceded:

> [I]n a number of cases . . . the veterans would be better off having attorneys represent them . . . . [T]here are some cases that are denied because all the evidence hasn't been obtained, and other cases I think are denied because some rating specialists misinterpret the law . . . [A]n attorney can argue the law much better than a lay person. Of course, an attorney could amass a much better brief of the facts than a lay person could.

(JA 255, 257).

VA attorneys actively participate in every aspect of the adjudication of claims. (JA 435). Over 800 VA staff attorneys decide claims, prepare ratings and SOCs, draft BVA opinions, and perform various other functions in the adjudication process. (JA 254, 281-82, 294-95, 331-33, 435; R 46 at 25, 26; R 149 at 12-15, 51-52, 69-71). Yet 98% of BVA appellants are not represented

by attorneys. (*See* JA 587). Lay "service representatives" from organizations such as the American Legion and the Veterans of Foreign Wars handle 87% of perfected appeals under powers of attorney, while 11% of appealing veterans appear *in pro per*. (JA 574). VA regional offices, where the vast majority of VA claims are resolved, do not maintain representation statistics, but representation by attorneys is "not common at all." (JA 381; *see also* JA 255). Veterans frequently represent themselves at the regional office level (JA 254, 417). Applications for the $10 contingency fee are virtually non-existent, and the district court found that the fee limitation effectively "eliminates" veterans' ability to hire private counsel. (Op. 22a; *see also* JA 398).

The problems attributable to the fee limitation have been exacerbated by the recent emergence of complex SCDD claims, including: (1) claims by veterans exposed to radiation during atomic bomb tests or to toxic defoliants such as Agent Orange; and (2) claims for post-traumatic stress disorder ("PTSD"), first recognized as a disabling condition by VA in 1980. (JA 243-46, 277-78, 280, 289-90, 610-21; R 149 at 31-32, 73-76; R 157 at 129). VA acknowledged that legal representation is most acutely needed in cases "turning on judgment" such as PTSD and Agent Orange claims. (JA 382-83).

> Many of the claims being adjudicated by the Veterans' Administration today, such as claims involving atomic radiation, Agent Orange, and Post-Traumatic Stress Syndrome, involve more legal and procedural complexities than do many judicially litigated matters . . . issues such as causation, burden of proof, administrative presumptions, and statutory time limits render many veterans incapable of adequately presenting a claim to the Veterans Administration.

(JA 170). "Veterans' claims involve increasingly technical matters of scientific proof, medical causation and multiple etiology." (JA 185; *see also* JA 382-83, 462; R 78 Ex. 19 at 172). "[U]se of experts, doctors, and treatises may be crucial to development and proof of these more recent claims." (Op. 32a; R 66 Miles Decl. ¶5; *see also* JA 383-84, 452, 466; R 157 at 50; R 161 at 536-37, 541-42).

The fee limitation contributes to minuscule success rates in complex claims. None of the more than 16,000 Agent Orange SCDD claims has been granted. (JA 384-85, 465-66, 509, 520). Similarly, only fourteen of 2,067 atomic veteran claims have been granted, each of which was initially denied. (JA 383, 462, 466, 515). In contrast, veterans' civilian counterparts, who have access to counsel, have been more successful despite the more stringent burden of proof. *See In re Agent Orange Product Liability Litigation*, MDL 381 (E.D.N.Y. filed Feb. 23, 1979) (Vietnam veterans and families recovered $180 million in settlement of Agent Orange class action); *Allen v. United States*, 588 F. Supp. 247 (D. Utah 1984) (ten downwind civilian victims of atomic tests with leukemia or cancer recovered $2.7 million).

Veterans must depend largely upon lay representatives from service organizations to counsel them concerning their legal rights, prepare and substantiate their claims, and conduct evidentiary hearings. "Almost none" of the service representatives are attorneys (Op. 36a), and none receives any formal training from the VA. Nor does VA attempt to assure their competence as representatives: "Now, the Veterans Administration must accredit each service officer who appears on a regular basis to present claims. But most of this accreditation, as I understand it, goes to good character and that kind of thing, rather than as such competence." (JA 369). Moreover, the VA Director of Compensation and Pension Service admitted that local service representatives "have limited ability, and some of them . . . might even be a volunteer or they're working for the county." (JA 478). Service representatives owe veterans none of the ethical duties and obligations that attorneys owe clients, and may withdraw their representation at any time without explanation. (JA 122).

VA persists in characterizing service officers as "effective," "adequate," "expert," and "skilled." (BFA 16, 17, 26, 30). Yet the district court found that service representatives, however well-intentioned, lack the skills, money, and resources to represent veterans adequately, especially in complex claims. (Op. 32a, 33a, 36-38a). The district court expressly found that service representatives provide "scant" representation compared to attorneys due to lack of legal training, insufficient resources, failure to conduct factual investigation, poor briefing, and lack of

oral advocacy. (Op. 36a-38a).[4] These problems are even more pronounced in complex SCDD claims. (JA 127, 143, 149, 180, 182). These shortcomings were documented below in numerous examples drawn from appellees' own claims as well as from a random sample of SCDD claim files selected by VA. (JA 610-24). The district court found that "[s]ervice representatives rarely gather or develop either expert testimony or documentary evidence on their own to support the applicant's claim." (Op. 36a). "[I]n almost all cases, the record will consist of the claimant's service history and his service medical history." (*Id.* quoting JA 347). Frequently, veterans "represented" by service representatives prepare their own claims.[5] Service representatives often commit fundamental legal or tactical errors in preparing claims, drafting briefs, and conducting direct examination. (JA 171, 349, 390, 397, 452, 474-75, 623; R 66 Caron Decl. ¶7; R 66 Miles Decl. ¶5; R 66 Tur. Decl. ¶5; R 70 Ex. 172; R 76 Exs. 158, 162; R 149 at 17, 33, 60-61; R 151 at 177-86). The typical SA prepared by a service representative (which must detail every disagreement with the SOC), fails to dispute the factual contentions contained in the SOC, rendering the appeal subject to summary dismissal. 38 C.F.R. § 19.126. (JA 343, 394). Service representatives "seldom" raise questions of law upon appeal, resulting in waivers of any errors of law. (JA 344, 365). The district court found: "When claimants do appear before the BVA

[4] Appellees' criticism of the services provided by service organizations explains the participation of the Disabled American Veterans as the lone *amicus curiae* for appellants herein. (DAV Br. at 3, 15). DAV appears to be alone among over 30 service organizations in its support for the fee limitation. For example, in Resolution No. 744, adopted in 1984, the Veterans of Foreign Wars expressed its support for elimination of the fee limitation. Similarly, the American Legion opposes the fee limitation, as do Swords, Vietnam Veterans of America, the American Veterans Committee, Jewish War Veterans of America, and many other VA service organizations.

[5] (JA 182, 188, 197, 217, 262, 297-99, 359-66, 384-85, 391-93, 399, 413, 417-20, 424-29, 456-57, 469, 472-73, 475, 478-81, 607, 608, 611, 613-15, 617-18, 622-24; R 66 Tur. Decl. ¶5; R 70 Exs. 172 at 17-19, 175; R 145 at 69, 93; R 151 at 151-54; *see also* JA 131-32; R 149 at 17, 60-61; R 151 at 177-86).

in a hearing, the first time they meet with the service representative . . . is usually just thirty minutes before the hearing." (Op. 37a).[6] At hearings, service representatives commonly do not pose questions. Instead, the district court found that they frequently rely upon rating board members to ask questions, despite the fact that the rating board may elicit responses that later are relied upon to deny a claim. (Op. at 37a; JA 133-34, 357, 432; *e.g.*, R 76 Exs. 158, 162). The district court found that

> the written memos produced by service representatives also suffer. Even in presenting a claimant's final appeal to the BVA, it is standard practice for service organization representatives to submit a one to two page handwritten brief. This rarely cites to authority, and in fact is frequently written by the claimant himself rather than by the representative.

(Op. 36a-37a). A BVA attorney adviser admitted:

> I'm disappointed with the American Legion's performance. . . . I told their national adjutant . . . that I felt many, many times their cases at the Board of Appeals level were not properly developed. In fact, they have a xerox, a form which they just type their name in, meaning the American Legion representative, ask that reasonable doubt be applied in the favor of the veteran and then they sign their name. And I don't consider that appropriate development, particularly in some cases where there is a need for development. It would make a difference in making allowance or denial . . . .

(R 149 at 17).

The district court found that service "representative[s] [do not] make up for these written inadequacies through oral advocacy. The vast majority of BVA hearings are handled merely

[6] (JA 127, 143-44, 149, 180, 182, 189, 197-98, 217, 346, 394, 599). In addition, the district court found that overwhelming case loads exacerbate the problem. (Op. 36a). In FY 1982, twelve to fourteen national service officers handled about 95% of the 1,328 central office hearings, or nearly 100 each. In addition, these officers handled a similar percentage of appeals in which hearings were waived, estimated to amount to more than 2,000 appeals per officer. (JA 366). "[T]he case loads of the national level staff appear to be crushing—about 5 cases to present per working day. It is difficult to conceive how effective representation can be provided for that number of cases." (JA 547; *see also* JA 255-57; R 149 at 33).

through the submission of an 'informal hearing memorandum,' and in these cases the claimant never meets with his representative." (Op. 37a). These memoranda typically consist of two pages or less, rarely cite authority, and supplant a live hearing. (Op. 36a-37a; JA 346-47, 349; *see also* JA 600-01). The following service representative's statement, designed to "allow the representative to clarify any points in contention or elaborate on them before the final referral" to the BVA, is typical of those prepared by service representatives. (JA 349; R 143 at 224-25; R 160 at 486-94). It states in its entirety: "The veteran appeals for service connection for sciatic nerve damage which he contends was caused by injections after contamination by atomic fallout. He believes his arthritis is of many years standing and had its inception during service. The third part of the appeal is for an increased evaluation of his Duodenal ulcer." (JA 44, 148; *see also* JA 606; R 76 Ex. 156).

III. THE ADVERSE CONSEQUENCES OF THE FEE LIMITATION ARE WELL DOCUMENTED IN THE RECORD

The district court concluded that the complexity of VA rules, practices, and procedures, the absence of legal representation, and the shortcomings of lay service representatives combine to discourage claimants from exercising procedural rights and cause many SCDD claimants to abandon their claims or appeals. (Op. 30a-31a; *see also* JA 141, 144-45, 147-48, 180, 182, 199-200, 324-25; R 67 Bit. Aff. ¶4; R 149 at 49-50). Furthermore, many potential SCDD claimants fail to file claims in the first place because they are unable to retain attorneys to represent them. "Many veterans chose not to go forward because [they are not] able to hire counsel." (JA 129; *see also* JA 155; R 67 Udall Aff. ¶¶1-3). VA admitted that "lots of claimants are frustrated with the process . . . and have given up on the system." (JA 334; *see also* JA 325; R 161 at 559-63).

The district court found, based upon uncontroverted evidence, that many claims are "abandoned" unknowingly. (Op. 30a-31a). Debilitative diseases often prevent veterans from investigating and pursuing valid claims or cause them to abandon their claims. (JA 144, 148). Furthermore, the district court found that inadvertent failures to comply with VA procedural requirements

result in claim denials. (Op. 30a-31a; *see also* JA 413-15, 485-86; R 66 Gret. Decl. ¶¶5, 6; R 67 Stav. Aff. ¶5). The claim is automatically denied without notice to the claimant by means of a "record purpose disallowance" upon expiration of the applicable response deadline. (JA 313-14, 449-50; R 77 Ex. 17 at 116-17). "This occurs quite frequently where someone is advised by us that they must produce certain evidence and they don't respond to the letter. We make a record purpose disallowance. The claim is considered abandoned a year from the date of our request." (JA 413). The veteran may labor indefinitely under the misimpression that his or her claim is still pending. (JA 46, 449-50). "We don't notify them that the decision is final without some inquiry." (JA 415). Significantly, "[t]hey're unaware of the record purpose disallowance, so there's no opportunity to appeal." (JA 414). An untimely SA means that, absent a rare finding of clear and unmistakable error, the merits of an appeal are never reached. (JA 387, 430-31; R 66 Gret. Decl. ¶5; R 77 Ex 17 at 141). The record purpose disallowance entails a forfeiture of accrued or retroactive benefits if the claim is ever reopened. (JA 414); 38 C.F.R. § 3.158(a). An overwhelming percentage of disallowances are "record purpose" disallowances, and few abandoned claims involve formal withdrawals. (JA 485, 590-97).

Although claimants who exercise the right to a hearing are almost twice as apt to prevail, few veterans actually request hearings. (JA 224, 254, 259, 278-79, 281, 295-96, 334, 335, 339-40, 416-17, 525, 527; R 67 Bit. Aff. ¶ 4; R 154 at 215-17; R 155 at 161). Only 12,196 regional office hearings were held nationally in FY 1982 out of 1,030,884 total actions taken, an incidence of but 1.2%. (R 74 Ex. 98 at 3; R 154 at 216). Appellate trends are just as pronounced. "[P]ersonal hearings comprise a very small part of the Board [BVA] workload." (R 156 at 268). "Of more than 34,000 cases decided by the BVA in FY 1978, only 1,452 involved personal appearance[s]." (JA 562; *see also* JA 602-05). Service representatives often fail to exercise the veteran's right to obtain a personal hearing, and generally only request hearings "where the claimant insists on it or where they think the decision is particularly outrageous in light of the evidence of record." (JA 259). In contrast, "attorneys do like to have hearings and go

eyeball to eyeball and flush it out." (JA 295). Furthermore, a substantial number of veterans neglect to request a hearing transcript, although one is always prepared for VA's own use. (R 46 at 24; R 143 at 250; R 159 at 411-14). Veterans rarely exercise their right to review their claim files, and the few veterans who do schedule hearings "fairly commonly" do not appear. (JA 379; R 143 at 253). Even in the few instances where veterans exercise the right to a hearing, documentary evidence is rarely submitted, expert testimony is infrequently offered, and normally the claimant alone testifies. The average VA hearing lasts a mere 39.5 minutes. (JA 357, 573; R 156 at 267).

Similarly, the vast majority of unsuccessful claimants do not exercise their right to appeal, despite the fact that the mere filing of a NOD (notice of appeal) prompts regional offices to summarily reverse 14% of initial denials. (R 158 at 351). For example, only 1,954 of the roughly 250,000 appealable Northern California region decisions (.9%) resulted in NODs (notices of appeal) in FY 1982. (JA 387; *see also* JA 308-10, 324-25). Moreover, the appeal abandonment rate between the NOD and SA stages alone ranges from 25.6% to 34.8%. (R 46 at 22). Significantly, the vast majority of "abandoned" appeals involve inaction by a veteran rather than deliberate action. (JA 485-86, 590-97). For example, in the first part of 1983, 81.1% of Northern California region claims in which an appeal was instituted by filing a NOD were "closed" due to the veteran's failure to file a timely SA; fewer than 1% were formally withdrawn. (JA 485, 596). The VA acknowledged that "quite a few" unrepresented claimants become "extremely frustrated" after an initial denial and give up. (JA 485-86). In contrast, attorneys almost uniformly follow through on claims to their completion and do a "good job." (JA 460; *see also* JA 432-33; R 180 Ram Supp. Decl.).[7] "I'm sure an

[7]VA totally disregards the district court's express finding that available statistics regarding BVA attorney-agent/service representative success rates were not meaningful. (Op. 27a). "Not only may paid attorneys be able to devote more time and resources to the cases, but they may also develop substantial expertise in the complicated legal areas involved with SCDD claims. Currently, the few attorneys who take SCDD cases generally do so on a one-time basis." (*Id.* (citations omitted); *see also* JA [illegible]). The district court's finding is not clearly erroneous, especially as attorney/service representative success rates from discharge upgrade proceedings, which are not subject to the fee limitation, show that veterans represented by private counsel had the highest success rate—over 72%. (Op. 27a; JA 548, 569). By comparison, claimants represented by service organizations had a 48% success rate. (JA 569).

attorney who's got a strong interest in a case will pursue it and inquire as to what our procedures are and see that we followed them." (JA 382). BVA reverses or remands more than a quarter of the few perfected appeals, and VA has predicted a significantly higher reversal rate were judicial review of VA decisions allowed. (R 75 Ex. 114 at 31-33). It follows that a large number of abandoned claims would have resulted in compensation had the claimants been represented by counsel, who would have followed through with the claims or appeals.

The district court found that the absence of legal representation leaves veterans vulnerable to administrative errors and sharp practices, as actual VA practices often diverge markedly from regulatory requirements. (Op. 35a). For example, the regulation that guarantees claimants a right to a hearing "at any time on any issue," 38 C.F.R. § 3.103(c), which VA acknowledged is an "integral part" of due process (JA 401), was jettisoned by VA in an adjudication memorandum:

> Although VAR 1103 permits a hearing anytime on any issue, we do not have the resources to operate in this way. Hearings should *follow* the Statement of the Case. Hearings are not to be scheduled before the SOC in all but the most unusual cases. We can always explain why a hearing is not appropriate at a particular stage in processing. In cases previously disallowed, the hearing process must be discouraged as a means of presenting new and material evidence. . . . I know you are aware of these points but the appellant isn't. To effect this change in policy, employees will obtain the initials of a Section Chief on all requests to 21 to schedule a hearing.

(JA 401-11, 512-13). Indeed, VA's long-standing "unofficial" policy has been to ignore 38 C.F.R. § 3.103(c), and honor hearing requests only *after* a decision has been rendered, a NOD filed, and a SOC prepared. (JA 247-49, 259-60, 401-11, 512-13).

"Your request for a hearing will be considered at a later date. We do not normally grant hearings before the original decision is made. If this decision is not favorable to you, you will have an opportunity to file a Notice of Disagreement and initiate an appeal. Hearings are offered as part of the appeal process." (JA 514). Thus, VA denies unrepresented veterans hearings before decisions are made—the most meaningful stage in the adjudication of claims. (JA 379-80, 403-04, 436, 439-40, 448). Because few claims proceed as far as a NOD, the impact upon the 99% of claimants who do not perfect appeals is considerable. Moreover, the few claimants who exercise their truncated post-decisional "right" to a hearing bear the added burden of persuading the rating board to change its mind. Significantly, a rating board member recalled but one instance in ten years in which a *post hoc* hearing persuaded him to change an initial decision. (JA 247-48, 251-52; R 148 at 42-43; *see also* JA 259).

The district court also found that unrepresented claimants are frequently targets of concerted efforts by VA officials to induce them to surrender important procedural rights, such as their right to a hearing. (Op. 35a; JA 88-89, 91, 93-94, 500-01, 507-08, 512-13, 526; R 72 Ex. 11; R 76 Ex. 163; R 78 Ex. 18 at 8; R 156 Ex. 83). VA admitted that its form or "pattern" letter sent to unrepresented claimants who request hearings contains these false or misleading statements: (1) written submissions are equivalent to live testimony; and (2) a hearing request would cause multiple delays before decision. (JA 91, 93-94, 380-81). VA's practice of coaxing waivers from unrepresented claimants is particularly important because the district court found that exercise of the right to a hearing is "crucial to a veteran's chance of success" and statistically improves a veteran's chance of success almost two-fold. (Op. 35a; *see also* R 53 at 3, 4). In the related area of military discharge upgrade proceedings, "[t]he chance of success improves markedly when the veteran personally appears before the Boards, a step most veterans are probably unwilling to take without representation." (Op. 27a; JA 544).

The district court expressly found that other aspects of the VA system do not compensate for the deprivation of counsel. (Op. 32a-38a). Indeed, VA's characterization of the claims process as non-adversarial and of VA's role as supportive contradict the

express findings of the district court. (*See* Op. 31a-36a).[8] The district court found that, in practice, VA pays little more than lip service to the regulation obligating it to assist veterans in developing the facts necessary to support their claims. (Op. 33a-35a). The "assistance" rendered by VA is invariably limited to seeking service and medical records. (Op. 36a; JA 347). "[I]t's up to the claimant first, yes. . . . [T]he primary responsibility is for the claimant to try to develop the information and the documentation to establish his claim. And then we are secondarily responsible in certain areas." (JA 471). For example, the district court found that VA makes no effort to cross-reference atomic radiation claims to detect patterns of exposure or disease or to interview, locate, or even identify witnesses possessing pertinent information concerning a claim. (Op. 34a-35a). "Ordinarily the burden of that falls to the veteran." (JA 277, 312, 355-57, 371, 385,471-72; R 153 at 78; R 158 at 313; R 160 at 480-81; *see also* JA 198; *see generally* R 148 Ex. 187). "We really wouldn't know where to begin to look . . . ." (JA 415). Likewise, the district court found that, "even where the relevant information . . . lies particularly within the control of the VA, it does not make the necessary effort to obtain that information." (Op. 34a).

Moreover, the district court found that VA rarely utilizes other available sources to aid it in assuring the accuracy of its more complex determinations. (Op. 34a). For example, the

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[8] The district court also observed: "The dual dictate of 38 C.F.R. § 3.103(a) (1983), which requires VA personnel to provide claimants with 'every benefit that can be supported in law while protecting the interests of the Government,' also raises a question as to the extent to which it is possible to serve the interests of both the VA and claimants simultaneously. Clearly, the financial interests of these two parties may often conflict, and it is not inconceivable that VA personnel might feel some pressure to protect the government purse." (Op. 33a n.17). Faithful performance of each of the VA's conflicting roles—promulgator of rules and regulations, decision-maker, guardian of government's purse strings, and friend to veterans—is impossible. The true, adversarial nature of the relationship between VA and SCDD claimants is emphasized by attorneys familiar with the VA and claimants alike. (JA 149, 159, 172, 179, 199, 217; R 66 Siem. Decl. ¶4; R 66 Miles Decl. ¶6; R 66 Caron. Decl. ¶¶8-9; R 66 Stav. Aff. ¶9; R 67 Bit. Aff. ¶4; *see also* JA 327-28, 357, 401-13).

Northern California Regional Office has never requested an expert medical opinion on causation or exposure respecting any atomic veteran claim it has adjudicated. (Op. 34a; JA 252, 271, 372, 397-98; R 143 at 231; R 157 at 51-52). Indeed, VA requested only 202 advisory medical opinions nationwide in FY 1982, or roughly one for every 10,000 claims it adjudicated. (JA 559; R 86 Der. Aff. ¶2). In addition, unpublished VA directives forbid adjudicators from exploring many promising sources of pertinent documents, such as other government agencies. (JA 354, 415-16, 481-485; R 143 at 149-51; R 156 at 238; R 157 at 20-23, 98-102; *see also* R 72 Ex. 12 at 33-36; R 156 Ex. 84). "I can't understand the rationale behind it. I still think we should be permitted to develop relevant, persuasive evidence wherever it is." (JA 483). Investigative shortcomings are also common in more prosaic SCDD claims. (R 67 Bit. Aff. ¶3).[9] For example, the district court found that VA rarely invoke its statutory power to obtain documents in support of a claim; VA has issued only five subpoenas since 1976, most of which sought proof of claimant fraud. (Op. at 35a). Unfortunately, a veteran "is generally unable to discover or obtain government documents." (JA 172; *see also* JA 216-17; R 66 Miles Decl. ¶6; *cf.* R 143 at 255).

By VA's own admission, erroneous deprivation of SCDD is frequent, as are procedural irregularities. (JA 233, 256, 289, 477;

[9] The district court found that the VA's meager development of facts stems in part from its personnel policies and productivity measures. (Op. 33a). The Northern California region, for example, employs seventy-six claims examiners and clerks to handle approximately 62,000 claims (816 claims per employee annually), who collectively are allotted only 2.84 hours to develop, process, and decide an initial SCDD claim. (Op. 33a; JA 238-40, 246-47, 279, 374-75, 387-89, 510; *see also* R 157 at 8-13). Time credits are even more modest for deciding reopened claims or appeals, and no credit is given for responding to claimant correspondence. (JA 373-75, 443-46; *see also* R 70 Exs. 167-75). Employee performance is assessed based in part upon average claim handling time, a system which encourages claims examiners to process claims expeditiously. (JA 388-89, 446). "[I]t is ludicrous to have such production standards. But they exist, and there is nothing I can do about it, so I live within the system." (JA 279-80).

R 66 Siem. Decl. ¶3; R 72 Ex. 10 at 12-15; R 74 Exs. 98, 100; R 76 Ex. 160; R 152 at 261-63; R 155 at 68-80, 133; R 157 at 46). This admission is supported by the claim files of the individual appellees and by a series of claim files randomly selected by VA and produced in discovery. (R 145 Exs. 177-82; R 152 Ex. 194; R 158 Ex. 87 *passim*). "The rating process is done by human beings and errors exist. And many things are matters of judgment." (JA 256; *see also* JA 289-90). The district court found that the fee limitation, judged in the context of VA's current adjudication rules, procedures, and practices, creates a "high risk of erroneous deprivation,"[10] and "deprives [appellees] of the ability to make a full presentation of their claim[s] to the VA." (Op. 22a-38a). In addition, the district court found that the

[10] Due in large measure to the prohibition against judicial review of VA decisions, courts rarely obtain a glimpse of this fact. *See generally* Goldhammer, *Veterans Disability Benefits: The Last Sad Stronghold of Untrammelled Administrative Discretion*, 8 Bev. Hills B.J. 33 (1974). However, recent decisions involving the VA's recoupment and set-off programs illustrate the adversarial nature of the claims process, the VA's frequently strained interpretation of statutes, and the problems experienced by unrepresented VA claimants. In *deMagno v. United States*, 636 F.2d 714 (D.C. Cir. 1980), the court stated: "We have read and reread the administrative record and the briefs of the parties, and confess ourselves mystified at the action taken by the VA in this case. Either the VA is withholding, both from us and deMagno, *all* evidence which would justify its conduct, or this woman has been the victim of wholly arbitrary administrative ineptitude, leaving her impoverished for nearly four years." 636 F.2d at 716 (emphasis in original). Similarly, in *United States v. Brandon*, 584 F. Supp. 803 (W.D.N.C. 1984), the court decried the problems encountered by unrepresented veterans in defending recoupment attempts by the VA: "The impression that the VA may be thus oppressively implementing the [recoupment] law is especially disturbing in light of the large number of recent suits filed by the United States against veterans. . . . [A]lmost half of the civil cases filed in this division the first half of 1983 were suits of that nature. Generally, the amounts sought by the government are less than $1,000 . . . . *The court is not aware of any case in which the veteran has been represented by a lawyer.* This is the first such case before this judge in which a veteran has contested, in court, the liability alleged by the United States." 584 F. Supp. at 807 (emphasis added).

"complexity of the substance and procedures involved . . . , as well as the importance of the interest at stake . . . give rise to a need for representation" of constitutional dimensions. (Op. 38a).

SUMMARY OF ARGUMENT

VA's appeal depends upon a series of inconsistent arguments. First, VA seeks to avoid the abuse of discretion standard of review applicable to preliminary injunctions by claiming the district court committed "decisive" legal error. (BFA 23). Yet nowhere does VA defer to the district court's express findings of fact or even argue they are "clearly" erroneous.[11] Indeed, VA disclaims any obligation even to discuss the record before the district court and its brief is devoid of citation to the voluminous record below. (BFA 16, 22). Rather, VA repeatedly refers to "facts" not of record, which in many instances are wholly inconsistent with uncontroverted facts below and express findings of the district court.[12] Finally, in framing its argument of

[11] Federal Rule of Civil Procedure 52(a) provides in pertinent part: "[I]n granting or refusing interlocutory injunctions the court shall . . . set forth the findings of fact and conclusions of law which constitute the grounds of its action . . . . Findings of fact shall not be set aside unless clearly erroneous . . . ." A finding of fact is not clearly erroneous unless "the reviewing court *on the entire evidence* is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1941) (emphasis added). "It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent. [Citations omitted.] We are not given those choices, because our mandate is not to set aside findings of fact 'unless clearly erroneous.' " *United States v. National Association of Real Estate Boards*, 339 U.S. 485, 495-96 (1950). While VA claims the district court applied an incorrect legal standard (BFA 15, 23), it does not dispute the well-established due process and First Amendment principles applied by the district court. Rather, it quarrels only with the district court's ability to receive evidence and its findings of fact.

[12] Rather than citing the record, VA cites hearsay from unsworn, conclusory statements by its own officials before Congress (BFA at 29, 40), and artfully edited excerpts from committee reports regarding bills that died in committee. (BFA 9-10, 29, 40-43). These materials were not presented to the district court and therefore should not be considered by this Court. *See Economic Development Corp. v. Model Cities Agency*, 519 F.2d 740, 744 (8th Cir. 1975) (appellate court ruling on propriety of preliminary injunction must base its review on the record presented to the trial court); *Russell v. Cunningham*, 233 F.2d 806, 809 (9th Cir. 1956) (appellate court is confined to district court record in determining whether findings were clearly erroneous). Moreover, VA argues that the facts of record below were virtually identical to the facts presented to Congress, while simultaneously relying upon legislative "statements" inconsistent with the record below. In fact, VA's selective rendition of legislative "facts" is inconsistent with the district court's findings and the uncontroverted facts adduced below. In stark contrast to the specific factual findings of the district court based upon deposition testimony of key VA officials, actual claims and affidavits from individuals intimately acquainted with the adjudicative process, VA's selective rendition from legislative events is vague and conclusory.

legal error, VA abandons its argument that appellees do not possess a property interest in SCDD (BFA 46 n.49), which is largely a legal question. Instead, VA focuses upon the second stage in due process analysis, the balancing of interests, which is inextricably tied to the particular facts of record and, therefore, peculiarly invokes the district court's discretion. In sum, VA asks the Court to find "legal error" by disregarding the record, substituting "facts" not of record, and treating appellees' as-applied challenges as merely facial.

VA has failed to demonstrate that the district court abused its discretion in granting the preliminary injunction. The district court properly determined that appellees were likely to prevail on the merits of their claim that they have a constitutional right to retain attorneys at their own expense unhampered by the $10 fee limitation. Unlike applicants who in the past brought purely facial due process challenges to the fee limitation, appellees documented the adverse effects of the fee limitation on the initiation, development, prosecution, and success of their SCDD claims. The fee limitation discourages the filing of SCDD claims, contributes to minuscule success rates in complex claims, prevents the utilization of fundamental procedural rights (often as a consequence of waivers solicited by VA), results in the abandonment of large numbers of SCDD claims, and retards correction of the frequent substantive and procedural errors VA makes in

adjudicating claims. Combined, these characteristics of the VA system cause a high risk of erroneous deprivation of SCDD, upon which many appellees or their survivors depend for the necessities of life. (Op. 21a-38a). These same facts demonstrate that the fee limitation deprives appellees of their First Amendment right to meaningful access to the VA adjudication system, the sole avenue by which veterans or their survivors may obtain redress for service-connected deaths and disabilities. These facts were completely unrebutted by VA below. Consequently, VA is precluded from contending that the district court's factual findings were clearly erroneous.

VA argues that the abuse of discretion standard of review ought to be discarded, noting the voluminous record below, the very record it has elsewhere spurned. (BFA 16, 22). Yet there is no authority for applying anything but the abuse of discretion standard.[13] Similarly, VA also disregards two of the three preliminary injunction factors—the likelihood of irreparable injury and the balance of hardships. Thus, VA has conceded that the district court did not abuse its discretion in finding that appellees would suffer irreparable injury absent a preliminary

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[13] The Court has uniformly applied the abuse of discretion standard to review of preliminary injunctions. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32, 934 (1975) ("[W]hile the standard to be applied by the district court in deciding whether a plaintiff is entitled to a preliminary injunction is stringent, the standard of appellate review is simply whether the issuance of the injunction, in light of the applicable standard, constituted an abuse of discretion .... [W]e cannot conclude that the District Court abused its discretion by granting preliminary injunctive relief. This is the extent of our appellate inquiry."); *Brown v. Chote*, 411 U.S. 452, 457 (1973) ("In reviewing such interlocutory relief, this Court may only consider whether issuance of the injunction constituted an abuse of discretion."). VA suggests that the abuse of discretion standard is inapplicable because the preliminary injunction may be in effect for up to a year pending trial and because the record below was extensive. All preliminary injunctions are in effect pending trial. Notably, VA has made no effort in the district court to advance this case to trial since the preliminary injunction was issued. Furthermore, the Court has never suggested that the anticipated date of trial or size of the record should make any difference in the standard of review.

injunction and that the balance of hardships weighed heavily in favor of appellees. (Op. 48a-51a).

Finally, VA urges the Court to ignore the record below and defer to legislative "determinations" that were not presented to the district court. (BFA 16). This argument was not even raised below, and should not be considered by this Court. Furthermore, the abject deference sought by VA is inappropriate here because: (1) Congress never made findings of fact in enacting or reenacting the fee limitation and never intended the fee limitation to harm veterans or restrict their rights; (2) VA's unsworn, conclusory statements of VA officials and artfully edited conclusory excerpts from Senate committee reports about bills that died in House committee are not Congressional findings and are not the proper subjects of judicial deference; and (3) appellees' claims involve procedural due process and the right to petition, and the abject deference sought by VA would require the Court to abdicate its responsibility to determine what procedures the Constitution requires concerning property interests created by Congress.

ARGUMENT

I. THE FEE LIMITATION DEPRIVES APPELLEES OF DUE PROCESS

A. VA Has Conceded That Appellees Possess a Property Interest

VA abandons the contention, advanced in the district court and highlighted in the Jurisdictional Statement, that veterans do not possess a Fifth Amendment property interest in SCDD. VA admits that SCDD recipients have a property interest, and "do[es] not press" its argument concerning applicants. (BFA 46 n.49). Thus, VA does not seriously dispute that the district court properly concluded that SCDD applicants and recipients possess a property interest in SCDD. (Op. 15a-19a). Appellees therefore simply refer the Court to the extensive analysis and citations in the district court's opinion. (Op. 15a-19a).[14]

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[14] *See Daniels v. Woodbury County, Iowa*, 742 F.2d 1128, 1132-33 (8th Cir. 1984) (state general assistance applicant has property interest); *Ressler v. Pierce*, 692 F.2d 1212, 1214-16 (9th Cir. 1982) (applicants for subsidized housing have a property interest because of standards determining eligibility); *Kelly v. Railroad Retirement*

B. Due Process Requires that Appellees Be Permitted to Retain Counsel Unhampered By the $10.00 Fee Limitation

VA bases this appeal largely on the due process stage that is inextricably intertwined with the facts—the determination of wha. process is due disabled veterans.[15] (BFA 25). Yet, VA

Board, 625 F.2d 486, 489 (3d Cir. 1980) (disability compensation applicants under Railroad Retirement Act have a property interest); *Griffeth v. Detrich*, 603 F.2d 118, 121 (9th Cir. 1979), *cert. denied*, 445 U.S. 970 (1980) ("authorizing statute coupled with the implementing regulations of the county creates a legitimate claim of entitlement and expectancy of benefits in persons who claimed to meet the eligibility requirements for general relief"); *Wrigh' v. Califano*, 587 F.2d 345, 354 (7th Cir. 1978) ("denials [of Social Security benefits] do not necessarily deserve less due process than terminations" (citation omitted)); *Davis v. United States*, 415 F. Supp. 1086, 1090-91 (D. Kan. 1976) (inmate applicant for prison disability benefits has property interest); *Shaw v. Weinberger*, 395 F. Supp. 268, 270 (W.D.N.C. 1975) (applicant for SSI has property interest); *Barnett v. Lindsay*, 319 F. Supp. 610, 612 (D. Utah 1970) (welfare applicants must be accorded due process in initial as well as terminal administrative proceedings); *Schware v. Board of Bar Examiners of New Mexico*, 353 U.S. 232, 238-39 (1957) (due process applies to determination of eligibility for professional employment); *see also Devine v. Cleland*, 616 F.2d 1080, 1086 (9th Cir. 1980) (veterans receiving non-service connected educational benefits have property interest); *Plato v. Roudebush*, 397 F. Supp. 1295, 1308 (D. Md. 1975) (veterans receiving non-service connected pension benefits have property interest).

[15] To resolve this question, the Court must balance the interests of veterans in retaining a lawyer against the government's claimed interest in forbidding veterans from retaining attorneys. *See Goldberg v. Kelly*, 397 U.S. 254, 262-63 (1970). The Court has uniformly applied the following three-part test enunciated in *Mathews v. Eldridge*, 424 U.S. 319 (1976) in procedural due process cases: "[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail". 424 U.S. at 335 (citation omitted). VA

premises its claim upon legal error while disregarding the district court's factual findings. Application of the *Mathews* test clearly shows that veterans have a right to retain counsel at their own expense.

1. Veterans have strong interests in obtaining SCDD and securing legal assistance

The district court expressly found that veterans' interest in obtaining SCDD was "extremely high" based upon uncontroverted evidence of record. (Op. 20a). Many recipients are totally or primarily dependent upon SCDD for their support. (JA 45-82, 199, 322-23). Service-connected injuries frequently interfere with or preclude employment of a veteran upon return to civilian life, while deaths often deprive a veteran's dependents of their principal or sole means of support. (JA 147, 199, 307-08, 378). SCDD claimants are frequently sick or disabled and many bring companions for physical assistance at regional office appearances. (JA 394-95). "[W]e have lots of people that . . . can't even afford a car or, they can't even have a driver's license any more." (JA 493; *see also* JA 542).

The district court further found that veterans have a compelling need for legal assistance in prosecuting SCDD claims. (Op. 38a). The veteran, who along with his or her service representative is usually a layperson, must confront VA adjudicators who, as noted above, usually have law degrees and are conversant with the VA's complex substantive and procedural rules. "Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries." *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 7 (1964) (citation omitted).

The complex VA rules and procedures, startling claim abandonment rates, pattern of overreaching concerning unrepresented claimants, pervasiveness of government attorneys, minuscule success rates, necessity for retaining and examining experts in complex claims, and other features of the adjudication

nowhere explains how a court could possibly perform this balancing process without an "evidentiary proceeding." (BFA 35 n.35).

process described above[16] make the right to retain an attorney a due process requirement.[17] Based on this evidence, the district court expressly found:

> Absent the fee restriction claimants would be able to hire attorneys to assist them in gathering medical and other documentary evidence, finding witnesses who could confirm

[16] VA argues that if the adjudication of claims is not operating as Congress intended, then Congress ought to correct these abuses directly. (BFA 19). This argument obscures the real constitutional issue—what need exists for attorneys given the VA system as it operates in fact?

[17] Indeed, there are but a few peculiar instances where the Court has denied individuals the right to retain counsel. These cases are readily distinguished by the settings involved and the interests at stake. First, in *Wolff v. McDonnell*, 418 U.S. 539 (1974), the Court held that prison inmates were not entitled to either retained or appointed counsel in prison disciplinary hearings. (The inmates were free, however, to consult with counsel outside the hearing room). The setting was that of a "closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so." 418 U.S. at 561. The Court reasoned, "It is immediately apparent that one cannot automatically apply procedural rules designed for free citizens in an open society . . . to the very different situation presented by a disciplinary proceeding in a state prison." *Id.* at 560. The converse is equally true. *Baxter v. Palmigiano*, 425 U.S. 308, 315 (1976), insofar as it is pertinent here, merely reaffirmed the *Wolff* holding. There is no counterpart here to the exigencies of prison discipline which were so crucial to the holdings in *Wolff* and *Baxter*. Second, in *Goss v. Lopez*, 419 U.S. 565 (1975), the Court held that high school students threatened with suspensions of 10 days or less, while entitled to limited due process protections, need not be afforded an opportunity to secure counsel. This decision was based largely on the summary nature of the decision and the short duration of the suspensions. 419 U.S. at 582-84. The Court acknowledged that "longer suspensions or expulsions . . . may require more formal procedures." *Id.* at 584; *cf. Black Coalition v. Portland School District No. 1*, 484 F.2d 1040, 1045 (9th Cir. 1973) (right to counsel at proceedings prior to expulsion). Clearly, veterans' interest in receiving SCDD, which may affect subsistence levels over a lifetime, is of far greater consequence than the ten-day school suspension involved in *Goss*.

> the claimants' version of events which transpired, obtaining expert testimony and reports, and presenting their evidence in a convincing fashion both on paper and in oral argument. Attorney representation is also more likely to ensure that veteran claimants comply with procedural rules and have their claims decided on the merits.

(Op. 38a). Recognition of veterans' right to retain attorneys would: (1) allow veterans to obtain legal advice about (a) existence of a valid claim, (b) the likelihood of success, and (c) VA's substantive and procedural rules, including complex factual and evidentiary requirements; (2) improve the investigation, preparation, and prosecution of SCDD claims; (3) insure veterans' utilization of fundamental procedural rights provided by law; (4) reduce the incidence of veterans' abandonment of valid claims; and (5) minimize the procedural and substantive errors and irregularities that characterize the adjudication of SCDD claims. In short, it would substantially increase the fairness of the VA adjudication system, reduce the risk of erroneous deprivation of SCDD, and allow the purpose of SCDD to be more effectively fulfilled.

As the Court stressed in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), "[O]ur decisions have emphasized time and again, [that] the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged." 455 U.S. at 433. Courts have consistently emphasized the need for representation by trained legal counsel in an administrative setting as a fundamental aspect of the right to be heard.[18] In *Goldberg v. Kelly*, 397 U.S. 254 (1970), the Court

[18] The authorities VA relies upon to suggest the contrary are completely inapposite. (BFA 26). Neither *Parham v. J.R.*, 442 U.S. 584 (1979), nor *Schweiker v. McClure*, 456 U.S. 188 (1982), considered the right to counsel at all. Both cases dealt with the qualifications of hearing officers and held that, in the context of the voluntary commitment of children to mental hospitals by their parents (*Parham*) and Part B Medicare disputes (*Schweiker*), such hearing officers need not be lawyers or judges. The remaining cases dealt with the government's obligation to appoint counsel for indigents in a variety of administrative settings, and not with the issue of the right to retain counsel. *Lassiter v. Department of Social Services of Durham County, North Carolina*,

held that the Due Process Clause of the Fourteenth Amendment requires that, before public assistance payments can be terminated, a welfare recipient must be afforded an evidentiary hearing at which he or she is entitled to be represented by counsel. 397 U.S. at 268-71.[19] The Court emphasized the teaching of

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452 U.S. 18, 24 (1981) (appointment of counsel in proceedings to terminate parental rights to be determined on a case-by-case basis; retained counsel allowed); *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973) (appointment of counsel in probation revocation hearings to be decided on a case-by-case basis; issue of right to retained counsel not decided); *Middendorf v. Henry*, 425 U.S. 25, 42-48 (1976) (no right to appointed counsel in summary courts-martial given peculiar exigencies of the military community and the opportunity to accept special or general court-martial, where retained or appointed counsel was available); *Vitek v. Jones*, 445 U.S. 480, 496-97 (majority), 500 (Powell, J., concurring in part) (1980) (appointment of counsel for prisoner threatened with transfer to mental hospital allowed but not constitutionally mandated; appointment of "qualified and independent assistance" constitutionally mandated; retained counsel implicitly allowed). Indeed, nearly all of these cases implicitly or explicitly recognized the right to retained counsel, which is all that appellees seek.

[19] *See also Ressler v. Pierce*, 692 F.2d at 1219-22 (applicants for public housing having a right to be advised of local legal service organizations); *Caulder v. Durham Housing Authority*, 433 F.2d 998, 1004 (4th Cir. 1970), *cert. denied*, 401 U.S. 1004 (1971) (public housing tenant facing eviction has a right to be represented by counsel); *Sartain v. Securities and Exchange Commission*, 601 F.2d 1366, 1375 (9th Cir. 1979) (right to counsel at hearings before SEC); *Black Coalition v. Portland School Dist. No. 1*, 484 F.2d 1040, 1045 (9th Cir. 1973) (right to counsel at proceedings prior to expulsion from school); *Cleaver v. Wilcox*, 499 F.2d 940, 945 (9th Cir. 1974) (counsel required to be appointed for indigent parents in certain child custody proceedings); *Crook v. Baker*, 584 F. Supp. 1531, 1556, 1559-60 (E.D. Mich. 1984) (right to retain counsel recognized in proceeding to rescind college degree); *Ferguson v. Metropolitan Development and Housing Agency*, 485 F. Supp. 517, 528 (M.D. Tenn. 1980) (rental subsidy benefit recipients have right to obtain counsel); *Feinberg v. Federal Deposit Insurance Corp.*, 420 F. Supp. 109, 120 (D.D.C. 1976) (bank officer has right to retain counsel in post-suspension proceeding); *Davis v. United States*, 415 F. Supp. 1086, 1098 (inmate applicant for prison disability benefits has right to retain attorney); *Batchelder v. Kenton*, 383 F. Supp. 299, 302 (C.D. Cal. 1974) (inmate has right to retain counsel for parole date revocation hearing).

Powell v. Alabama, 287 U.S. 45, 68-69 (1932): "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." 397 U.S. at 270. "Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient." *Id.* at 270-71. The Court concluded that the Due Process Clause requires that the recipient "be allowed to retain an attorney if he so desires," notwithstanding the government's asserted interests in informality and processing speed. *Id.* at 267, 270. The Court noted: "We do not anticipate that this assistance will unduly prolong or otherwise encumber the hearing." *Id.* at 271.

The lack of subsequent proceedings also points to the constitutional infirmities of the fee limitation. *See Boddie v. Connecticut* 401 U.S. 371, 378 (1971); *Mathews v. Eldridge*, 424 U.S. 319, 339, 349 (1976) (availability of post-termination hearings and judicial review before the denial of SSA disability benefits became final influenced Court's decision not to require pre-termination hearings). No similar subsequent protections ameliorate the impact of the fee limitation. The fee limitation applies at all stages of the administrative proceedings, and VA decisions are not subject to judicial review. 38 U.S.C. § 211(a). Moreover, veterans cannot sue under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq.*, for disabilities stemming from their military service, *Feres v. United States*, 340 U.S. 135 (1950). Thus, if VA denies a SCDD claim, a veteran has no recourse, and is condemned to a lifetime of uncompensated disability.

The arguments VA raises to support the fee limitation do not conform to the *Mathews* framework, and fail to address the district court's findings of fact. Contrary to VA's statement, unsupported by citation to the record (BFA 24), SCDD claims often involve complex legal determinations, as well as procedural questions involving interpretation of statutes and both formal and informal VA regulations. (*See supra n.3; see also* JA 290-93).

VA conceded that VA decisions involve complicated legal questions and emphasized these legal complexities below in justifying the VA's extensive legal staff. (JA 332, 632). Moreover, VA testimony below expressly contradicts VA's bald contention that credibility and demeanor play no significant role in SCDD decisions. (BFA 29). The highest ranking adjudication official for the Northern California region emphasized:

> [A hearing] allows the claimant to confront those decision-makers and show himself as an individual . . . . I think it injects a human note into the whole affair that otherwise would be reduced to an exchange of paper. And there are situations where just seeing the claimant, particularly in neuropsychiatric cases, just seeing the patient does more for the evaluation process than unending psychiatric reports.

(JA 379-80; *see also* JA 252, 448).

VA's argument that the "informality" of an adjudication process obviates the need for legal assistance or advice has been repeatedly rejected by the Court. For example, in *In re Gault*, 387 U.S. 1 (1967), the Court held that a juvenile subject to delinquency proceedings was entitled to retain counsel despite the informal, nonadversarial nature of the proceedings and the paternalistic interests of the state in tailoring the proceedings in accordance with its perception of the juvenile's best interests. 387 U.S. at 14-21, 25-31, 34-42. Like VA, Arizona emphasized that its "proceedings were not adversary," and that "juveniles obtain benefits from the special procedures applicable to them which more than offset the disadvantages" from lack of ordinary due process protections. *Id.* at 16, 21, 25-26, 35-36. The Court nevertheless looked beneath the surface of the legislation and "candidly appraised" the "claimed benefits of the juvenile process," *id.* at 22, concluding that juveniles had a due process right to retained (or, in the case of indigents, appointed) counsel. Again, in *Gagnon v. Scarpelli*, 411 U.S. 778, 786-87 (1973), the Court highlighted the value of attorney representation in the context of "informal" probation revocation proceedings:

> Despite the informal nature of the proceedings and the absence of technical rules of procedure or evidence, the unskilled or uneducated probationer or parolee may well have difficulty in presenting his version of a disputed set of facts where the presentation requires the examining or cross-examining of witnesses or the offering or dissecting of complex documentary evidence.

Despite abandoning its claim that appellees lack a property interest in SCDD, VA argues that a summary affirmance[20] in *Gendron v. Saxbe*, 389 F. Supp. 1303 (C.D. Cal.), *aff'd per curiam sub nom. Gendron v. Levi*, 423 U.S. 802 (1975), resolved the question of what process is due in VA claim proceedings.[21] (BFA 11). *Gendron*, however, is readily distinguishable. (*See* MA 22-25). *Gendron* involved a purely facial challenge—that the fee limitation should be declared unconstitutional without resort to evidence such as the characteristics of the disabled veteran population, the emergence of complex claims, the effects of the fee limitation upon the prosecution and success of claims and adjudication behavior, or the ability of service representatives to handle VA claims. No discovery was taken in *Gendron*,

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[20] The precedential significance of a summary affirmance must be assessed in the light of all facts. *Mandel v. Bradley*, 432 U.S. 173, 177 (1977). Furthermore, only questions adequately presented in the record are resolved by a summary affirmance. *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 182-83 (1979). Finally, summary affirmances "are not of the same precedential value as would be an opinion of this Court treating the question on the merits," and the Court is "less constrained by the principal of *stare decisis*" in dealing with "a constitutional question." *Edelman v. Jordan*, 415 U.S. 651, 671 (1974).

[21] VA admitted below that *Gendron* is "an anomaly in the law." (R 209 at 10). Significantly, VA also argued below that *Gendron* did not decide the question of what process is due. "Of course it is true that the *Gendron* Court never decided the specific question of what procedure was due in that instance." (R 82 at 5). Appellants now apparently contend that the *Gendron* Court reached the balancing stage. Even if the Court did reach the balancing stage, the analysis is different here because of the as-applied nature of appellees' claims and the fact that *Gendron* was decided upon a meager set of stipulated facts. VA also relies upon several other fee limitation cases, none of which are on point (BFA 18 n.17), as was recognized by the district court. (Op. 6a n.7). These cases mainly involve challenges by attorneys on equal protection, substantive due process, or freedom of association grounds. None involve an as-applied procedural due process challenge.

and the court acted on a brief set of stipulated facts. (MA App. G). By contrast, the instant case involves an as-applied due process attack based upon appellees' circumstances and current VA rules, practices, and procedures.[22] Unlike that of *Gendron*, the record here plainly documents the drastic effects of the fee limitation, including waivers of fundamental procedural rights such as the right to a hearing, abandoned claims, infinitesimal success rates in complex claims, forsaken appeals, uncorrected adjudication errors, and administrative misconduct *vis-a-vis* unrepresented claimants. This wealth of evidence was completely unrebutted below. Furthermore, the district court's findings concerning the ineffectual nature of the "representation" afforded by lay service representatives, almost none of whom are attorneys, are amply supported by the record below. (Op. 32a-33a, 36a-38a). Gendron did not even seek assistance from a service representative, and none of the stipulated facts addressed the adequacy or inadequacy of service representatives. (MA App. G). At the close of oral argument before the three-judge court, Gendron belatedly sought permission to submit testimony from a law student on the adequacy of representation, but his request was ruled untimely. (MA App. F). VA has now abandoned the claim made in its Jurisdictional Statement that *Gendron* raised this issue. (JS 13-14 n. 9). Consequently, none of the questions raised herein was adequately presented in the record in *Gendron*.[23]

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[22] "[A] statute, even if not void on its face, may be challenged because invalid as applied," *Whitney v. California*, 274 U.S. 357, 378 (1927), *overruled on other grounds, Brandenburg v. Ohio*, 395 U.S. 444 (1969) (citation omitted); and "[a] statute may be invalid as applied to one state of facts and yet valid as applied to another." *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 289 (1921); *see also Martinez v. Bynum*, 461 U.S. 321 n.10 (1983) ("We need not decide whether [the statute at hand] is unconstitutional as applied, for plaintiffs limited their complaint to a facial challenge of this statute"); *Zablocki v. Redhail*, 434 U.S. 374, 401 n. 2 (1978) (Powell, J., concurring) ("*Boddie* was an 'as applied' challenge; it does not require invalidation of [the statute at hand] as unconstitutional on its face").

[23] *Demarest v. United States*, 718 F.2d 964 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 2150 (1984), like *Gendron*, involved a facial challenge to the constitutionality of the fee limitation. The Ninth Circuit followed *Gendron* with little analysis or discussion. Demarest neither sought assistance from nor challenged the adequacy of the representation provided by service organizations. Moreover, Demarest took no discovery, and made no attempt to show the negative effects of the fee limitation upon the prosecution and adjudication of SCDD claims.

2. VA's interest in preserving the fee limitation is inconsequential

Below, VA did not assert any governmental interest in preserving the fee limitation. The district court found that "the government has failed to demonstrate that it would suffer any harm if the statutory fee limitation . . . were lifted." (Op. 39a). None of the VA "interests" VA now asserts was either argued below or is supported by the record. Thus, the Court should not entertain VA's arguments that elimination of the fee limitation would: (1) increase administrative costs or make claims processing more onerous (BFA 30); and (2) increase the formality and adversarial nature of VA proceedings. (BFA 20, 30-31).

Even if the Court chooses to hear VA's belated arguments, it should reject them. Although lawyers now represent veterans in 2% of VA claims, VA was unable to muster any evidence below that their participation in such claims increased average claim handling time, created any administrative difficulties, or damaged any government interest whatsoever. VA's argument that removal of the fee limitation would "alter the basic nature of the [adjudication] process" is also unpersuasive. (BFA 15). Appellees do not challenge VA's existing procedures, but merely seek legal assistance to understand and comply with VA's complex rules and procedures and to insure that they receive the statutory compensation they deserve. Removal of the fee limitation would in no way affect VA procedures, informal or not. Attorneys would represent veterans within the framework of the program and procedures Congress has established, just as they do now in approximately 2% of all claims. For the same reason, there is no credence to VA's suggestion that removal of the fee limitation would affect whatever procedural advantages veterans currently enjoy. (BFA 28). Likewise, there is no support in the record for DAV's argument that removal of the fee limitation would impair

the service organization network. Presumably, veterans would continue to use service representatives, whose services are free, whenever their interests justify it, and only resort to attorneys for complex claims or where they become disenchanted with service representation.

It is ironic that VA continues to press its paternalistic conception of veterans' interests in opposing a veterans' action attempting to establish the right to retain attorneys. VA cites overreaching by unscrupulous attorneys as one of its prime justifications for the fee limitation. (BFA 15, 32). It does so despite the fact that its own legislative "record" frankly states that this original rationale for the fee limitation "is no longer tenable." S. Rep. No. 97-466, 97th Cong., 2nd Sess. 50 (1982). A cruel irony, however, is that the overreaching and sharp practices that led Congress to enact the fee limitation in 1862 are now being committed by VA adjudicators against veterans. While overreaching by attorneys prompted the fee limitation in the unregulated professional environment of 1862, there is no reason to believe that state and local bar associations fail adequately to regulate the bar today.

VA's paternalistic depletion of benefits rationale is unpersuasive, especially with respect to complex SCDD claims, the success of which is most markedly prejudiced by the fee limitation. "[Y]ou're not depleting anything where there is no grant." (JA 389). Moreover, the district court found that "to the extent the paternalistic role is valid, there are less drastic means available to ensure that attorneys' fees do not deplete veterans' death and disability benefits." (Op. 39a-40a). Thus, the district court properly determined that the government's paternalistic justifications could be assigned no weight in the balance of interests. (Op. 49a-51a).

II. THE FEE LIMITATION VIOLATES APPELLEES' FIRST AMENDMENT RIGHTS OF PETITION, SPEECH AND ASSOCIATION

A. The Fee Limitation Deprives the Individual Appellees of Meaningful Access to the VA Adjudication System

The Court has recognized the "basic right to group legal action," holding that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the

protection of the First Amendment." *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 585 (1971); *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 5-6 (1964); *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217, 221-22 (1967); *NAACP v. Button*, 371 U.S. 415, 437 (1963).[24] The principle underlying these cases extends to individual efforts to obtain legal assistance. *Bates v. State Bar of Arizona*, 433 U.S. 350, 376 n.32 (1977). [25] Indeed, the Court vindicated the organizations' efforts precisely because they sought to aid their members: "Underlying [these cases] was the Court's concern that the aggrieved receive information regarding their legal rights and the means of effectuating them. This concern applies with at least as much force to aggrieved individuals as it does to groups." 433 U.S. at 376 n.32. Moreover, the right to petition protects individual efforts to obtain relief from administrative agencies as well as from courts. *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

The district court found that the fee limitation violates the individual appellee's First Amendment rights to obtain meaningful access to the VA adjudication system. (Op. 40a-48a). After concluding appellees need attorneys to help them prepare and present their SCDD claims to the VA (Op. 26a-38a), the district

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[24] The Court also has protected individuals' access to legal assistance and information in cases involving prisoners. For example, in *Bounds v. Smith*, 430 U.S. 817, 828 (1977), the Court held that states must protect the right of prisoners to meaningful access to the courts by providing law libraries or adequate assistance from legally trained persons. *See also Gilmore v. Lynch*, 319 F. Supp. 105, 110 (N.D. Cal. 1970), *aff'd per curiam sub nom. Younger v. Gilmore*, 404 U.S. 15 (1971) (invalidating prison regulation severely limiting law books in prison libraries because it denies reasonable access to courts, and noting that right to such access "encompasses all the means a defendant or petitioner might require to get a fair hearing from the judiciary").

[25] *See also Martin v. Lauer*, 686 F.2d 24, 32 (D.C. Cir. 1982), ("[W]hile private parties must ordinarily pay their own legal fees, they have an undeniable right to retain counsel to ascertain their legal rights." (citations omitted)).

court found that the fee limitation deprives unrepresented claimants, especially those with complex claims, of the ability adequately to present their claims. (Op. 38a). The fee limitation also has a chilling effect on First Amendment rights of the few veterans who do obtain attorneys by arbitrarily limiting the scope and nature of the legal services the attorneys can provide. (Op. 27a).[26] The fee limitation is more drastic than the restrictions in the union and NAACP solicitation cases, which did not completely choke off access to lawyers but left individuals free to retain lawyers without the aid of those organizations. The fee limitation effectively prevents nearly all veterans from securing legal assistance from any source. The fee limitation's adverse impact upon veterans' ability to mount their claims is heightened by the fact that the VA is the sole forum in which veterans' disability claims may be heard. For these reasons, the district court properly held that the fee limitation violates the First Amendment by preventing the individual appellees from retaining attorneys at their own expense.[27]

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[26] In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court held unconstitutional the sections of the Federal Election Campaign Act of 1971 that limited expenditures by candidates for federal office. The Court explained that "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." 424 U.S. at 19. Similarly, the $10 ceiling on the amount a veteran can spend on a lawyer necessarily restricts the number and type of issues that the claimant can raise and the depth of their exploration. Especially for veterans with complex claims that raise important political issues, such as atomic radiation and Agent Orange claims, this heavily burdens their First Amendment rights.

[27] Paradoxically, the VA recognizes that the right to be represented by counsel is an important part of the right to meaningful access to the VA adjudication system—38 C.F.R. Sections 3.103(d), 19.150 provide that each claimant has a right to be represented by an attorney of his choice. The fee limitation frustrates this right, however, by preventing SCDD claimants from retaining lawyers and receiving legal assistance.

B. The Fee Limitation Violates the First Amendment Rights of Organizational Appellees to Obtain Effective Legal Representation for their Members or Constituents

Swords and NARS were founded to serve and protect the interests of Vietnam veterans and veterans exposed to atomic radiation, respectively. Both organizations desire to provide legal representation for members or constituents who have potential or existing SCDD claims. However, the fee limitation cripples their ability to do so—neither Swords nor NARS can afford to provide sufficient free legal representation. Their inability to obtain reasonable compensation prevents Swords and NARS from providing services which they want to provide and which their constituents desperately seek and need. Thus, the district court found that the fee limitation also impairs the First Amendment rights of NARS and Swords to obtain effective legal representation for their members and constituents. (Op. 40a-43a). This holding was grounded on the principle that the rights to petition, speech, and association include the right of groups to obtain attorneys for their members without barriers from restrictive regulation where legal representation is necessary to effective access to governmental processes. *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217 (1967); *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 5-7 (1964); *NAACP v. Button*, 371 U.S. 415, 437 (1963); *see also United Transportation Union v. State Bar of Michigan*, 401 U.S. 576 (1971).

The position of Swords and NARS is akin to that of the unions in *United Transportation Union, Brotherhood of Railroad Trainmen*, and *United Mine Workers*. Like the unions whose efforts to secure effective legal representation for their members were stymied by restrictive state regulation, the fee limitation effectively precludes Swords and NARS from providing legal representation or advice for the veterans they were organized to assist, thwarting advancement of claims by NARS' and Swords' members to obtain compensation for disabling injuries. Therefore, the fee limitation constitutes an unwarranted violation of the First Amendment. A statute cannot "under the guise of prohibiting professional misconduct, ignore constitutional rights." *NAACP v. Button*, 371 U.S. at 438-39. Finally, special

scrutiny is warranted here because VA may be attempting to chill the exercise of First Amendment rights that might adversely affect its own interests. *See Porter v. Califano,* 592 F.2d 770, 780 (5th Cir. 1979) ("Especially where the government is one of the parties in the related litigation, courts must most carefully scrutinize government action which attempts to chill private speech designed to raise funds for the legal fees of the private party litigating . . . .").

C. The Fee Limitation Serves No Substantial Governmental Interest

A statute that impairs First Amendment rights can survive judicial scrutiny only if it serves substantial government interests, and is narrowly drawn to serve those interests. *NAACP v. Button,* 371 U.S. 415, 432-33 (1973); *In re Primus,* 436 U.S. 412, 432-33 (1978); *see also Buckley v. Valeo,* 424 U.S. 1, 14-23, 44-45 (1976). The district court found that VA offered no such substantial justification. (Op. 47a-48a). Below, the government sought to defend the fee restriction based only upon its paternalistic conception of veterans' interests—the prevention of overreaching by unscrupulous lawyers, and veterans' financial interest in receiving SCDD undepleted by legal fees. (*Id.*). As discussed above, the fee limitation serves no substantial government interest. Furthermore, the paternalistic arguments raised by VA are particularly suspect in the First Amendment context. *See, e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 770 (1976) (First Amendment assumes "that people will perceive their own best interests if only they are well enough informed").[28]

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[28] Even if appellees' claimed paternalistic interest were substantial, the fee limitation still would be unconstitutional because it is not a "narrowly drawn regulatio[n] designed to serve [the] interes[t] without unnecessarily interfering with First Amendment freedoms" (citations omitted). *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 637 (1980). A statute that intrudes on First Amendment freedoms must be "a precisely tailored means" of serving the substantial government interest that justifies it. *Secretary of State of Maryland v. Joseph H. Munson Co.,* 104 S. Ct. 2839, 2849 (1984). If the government's interest could be served "by measures less intrusive," then the statute is unconstitutional. *Id.* In *Schaumburg,* the challenged statute prohibited charities from paying expenses of more than 25% of the amount raised. The purpose of the statute was to prevent fraud. The Court noted that, rather than impose such an arbitrary ceiling, the statute could have punished fraud directly. 444 U.S. at 637-38 (1980). Similarly, the ostensible purpose of the fee limitation is to prevent fraud by attorneys. (Apps. E, I). As in *Schaumburg,* this purpose could be accomplished simply by punishing fraud directly. Indeed, state and local bar associations now perform this function. Because the statute is not narrowly drawn to serve its ostensible purpose, it is an unconstitutionally overbroad infringement of First Amendment freedoms.

III. CONGRESS HAS MADE NO FACTUAL FINDINGS CONCERNING THE FEE LIMITATION TO WHICH THE DISTRICT COURT SHOULD HAVE DEFERRED

A. Congress Has Made No Factual Findings Concerning the Fee Limitation

VA not only seeks to negate the record before the district court, but also urges this Court to substitute a different "record" drawn from legislative proposals for judicial review of VA decisions.[29] VA suggests this Congressional activity implies that Congress has determined the fee limitation to be fair, and the Court, therefore, ought to assume its fairness conclusively. (BFA 38). Analysis of the material cited by VA, however,

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[29] Significantly, the legislative "determinations" VA now raises were not presented to the district court. (*See* R 19; R 82; R 176). Rather, VA argued that appellees' claims were foreclosed by *Gendron* and *Demarest*'s property interest rulings, a position VA now abandons. Thus, VA is precluded from raising its "legislative determination" argument on appeal. *Dothard v. Rawlinson,* 433 U.S. 321, 323 n.1 (1977) ("Not having been raised in the District Court, that issue is not before us."); *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 147 n.2 (1970) (court declined to consider issue not raised below); *Van Huffel v. Harkelrode,* 284 U.S. 225, 229 (1931) ("[N]either of these objections was made below, nor were they discussed by any of the state courts. They cannot, therefore, be urged here."); *Virginian Railway Co. v. Mullens,* 271 U.S. 220, 227-28 (1926); *New York ex rel. Rosevale Realty Co. v. Kleinert,* 268 U.S. 646, 650 (1925); *Peck v. Heurich,* 167 U.S. 624, 628 (1897) (appellant could not raise argument not raised in the trial court because appellees would have introduced evidence to prove the contrary in the trial court, had appellant raised argument there).

reveals that Congress has never made findings of fact to which the district court might have deferred.

1. Congress Made No Findings of Fact When It Enacted the Fee Limitation

Scrutiny of the legislative history surrounding enactment and reenactment of the fee limitation, summarized in Appendix I, shows that Congress has never made express findings concerning the fee limitation.[30] Furthermore, this legislative history demonstrates that, contrary to VA's suggestion, the fee limitation was not: (1) part of a legislative "experiment" in "alternative dispute resolution" (BFA 16, 32); (2) designed to speed up the processing of VA claims (BFA 27); (3) an "important aspect of the informal and nonadversarial claim system . . . " (BFA 30); or (4) intended to serve any government interest whatsoever. Rather, its sole purpose was to protect veterans and their survivors from unscrupulous attorneys who were charging exorbitant fees for the purely clerical task of filling out simple pension claim forms. (MA App. E; App. I). Between 1862, when the fee limitation was first adopted, and the New Deal, the fee limitation expressly applied only to the essentially clerical task of completing the paperwork to obtain military pensions. (*Id.*) In reenacting the fee limitation, Congress never expressly considered the applicability of the fee limitation to the more extensive legal services

[30] VA apparently has abandoned its contention, advanced in the Jurisdictional Statement, that Congress made formal findings of fact with regard to the fee limitation. (JS 18-19). When Congress passes a law it may make findings of fact and set them forth in the statute or its preamble. For example, in passing the National Labor Relations Act, Pub. L. No. 198, 49 Stat. 449 (1935), Congress made specific findings that were embodied in the statute. However, Congress made no such findings of fact when it enacted or reenacted the fee limitation. *See* Act of Sept. 2, 1958, Pub. L. 85-855, 72 Stat. 1105; Veterans' Benefits Act of 1957, Pub. L. 85-56, 71 Stat. 83; (*see also* MA App. E; App. I). Thus there are no legislative findings of fact to which the district court should have or could have deferred. Apparently recognizing this fact, VA now abandons the "findings of fact" nomenclature. Instead, VA refers even more vaguely to legislative "determinations." (BFA 16, 34, 35, 38, 43). As shown below, upon examination these "determinations" turn out to be anything but that.

required by the complex SCDD programs and procedures created by Executive Orders in 1933, or to complex claims that have surfaced in the last decade. Various reenactments of the fee limitation, culminating in 1958, merely involved reorganization or consolidation of veterans' legislation, and the fee limitation was not mentioned in congressional debates or committee reports. (*See* App. I). Rather, it was mechanically subsumed as part of the existing body of veterans' law. Thus, Congress never made findings of fact when it enacted and reenacted the fee limitation. There is nothing in the legislative history concerning enactment of the fee limitation to which the district court could have deferred. To the contrary, the legislative history points only to the outmoded nature of the fee limitation.

2. The Court Should Not Defer to Unsworn VA Statements Before Congressional Committees or to Senate Committee Reports Concerning Bills That Died in House Committee

VA's deference argument is principally based upon legislative events subsequent to the most recent reenactment of the fee limitation in 1958. While VA makes a series of vague allusions to "recent" congressional action, it relies almost exclusively upon Senate Committee reports regarding omnibus bills that died in House committee and unsworn, conclusory statements of VA officials to legislative committees. None of these statements was subject to cross-examination. Examination of these materials shows that it is wholly misleading for VA to suggest that Congress recently made "legislative determinations" or "findings" regarding the fee limitation. (*See* BFA 16, 34, 35, 38, 43).

Various bills to provide for judicial review of VA decisions have been introduced in Congress in recent years. Each bill contained tangential amendments to the fee limitation allowing for additional fees in civil actions for judicial review of VA decisions. Each judicial review bill unanimously passed the Senate, but died in the House Veterans Affairs Committee ("HVAC").[31] (VA obliquely states that these bills "failed of

[31] The "Veterans' Administration Adjudication Procedure and Judicial Review Act," S. 636, 98th Cong., 1st Sess. (1983), was unanimously approved by the Senate Veterans' Affairs Committee ("SVAC") on May 18, 1983, and was passed in the Senate by

adoption," implying incorrectly they were voted upon and defeated. (BFA 35)). Thus, unless the Court wishes to defer to inaction by the twelve members of HVAC, there is nothing to which the Court might defer. Certainly, HVAC cannot be the arbiter of the constitutionality of legislation. Particularly when the legislative process has not been completed, the Court has been extremely reluctant to draw inferences regarding congressional intent. *See Wong Yang Sung v. McGrath*, 339 U.S. 33, 47, *modified on other grounds*, 339 U.S. 908 (1950) (where bill passed appropriate committees of both Houses and Congress adjourned without taking action, the Court refused to draw inference from "incompleted steps in the legislative process."). Even if the House had voted on bills containing amendments to the fee limitation, "unsuccessful attempts at legislation are not the least of guides to legislative intent." *Red Lion Broadcasting*

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unanimous voice vote on June 15, 1983. The HVAC took no action on it and the bill died with the close of Congress. The "Veterans' Administration Adjudication Procedure and Judicial Review Act," S. 349, 97th Cong., 2d Sess. (1982), was unanimously approved by the SVAC on June 8, 1982, and was passed in the Senate by unanimous voice vote on September 14, 1982. The HVAC took no action on it. The Veteran's Administration Adjudication and Judicial Review Act," S. 330, 96th Cong., 1st Sess. (1979), was approved by the SVAC with only one dissenting vote on May 3, 1979, and was passed in the Senate by unanimous voice vote on September 17, 1979. The HVAC took no action on it. Each of the foregoing bills was an omnibus bill which mainly involved judicial review. *See Veterans' Administration Adjudication Procedure and Judicial Review Act and the VA's Fiscal Year 1984 Major Construction Project Proposals: Hearing on S. 636 and Related Bills Before the Senate Comm. on Veterans' Affairs*, 98th Cong., 1st Sess. 10 (1983) (prepared statement of Hon. Gary Hart, U.S. Senator) ("[T]he cent[ral] issue contained in this legislation [was] judicial review . . . ."). They only secondarily involved aspects of the fee limitation. Congress has never considered a discrete bill to amend the fee limitation. As stressed by this Court in *Gemsco, Inc. v. Walling*, 324 U.S. 244, 265 (1944), "Rejection of an entire bill cannot be taken to be a specific rejection of each and every feature . . . ." This view should be of greater force here, where the omnibus bills not only were not defeated by any vote of Congress, but were never even reported out of committee in the House of Representatives.

Co., Inc. v. Federal Communications Commission, 395 U.S. 367, 382 n.11 (1969); *see also United States v. United Mine Workers of America*, 330 U.S. 258, 281-82 (1947). Furthermore, the Court should not attach any significance to VA's selective rendition of committee reports concerning bills not passed by Congress, especially because these reports contain other statements recognizing the unfairness of the fee limitation.[32]

VA's suggestion that the Court ought to defer to hearsay opinions expressed by VA officials in unsworn statements before Congressional committees considering judicial review bills is similarly misguided. (BFA 29, 40). (Notably, Senator Alan Cranston, a leading member of the SVAC, described VA's March 23, 1983, testimony regarding S. 636 as presenting "misleading arguments and distortions." *Veterans' Administration Adjudication Procedure and Judicial Review Act and the VA's Fiscal Year 1984 Major Construction Project Proposals: Hearing on S.636 and Related Bills Before the Senate Comm. on Veterans' Affairs*, 98th Cong., 1st Sess. (1983) (introductory statement of Hon. Alan Cranston, U.S. Senator)). Appellees could marshal many trenchant statements before Congress emphasizing the fundamental unfairness of the VA adjudication system, including the fee limitation.[33] However, this material is

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[32] *See, e.g.*, S. Rep. No. 97-466, 97th Cong., 2d Sess. 50-51 (1982): "The Committee is also of the view that the current statutory limitation is an undue hindrance on the rights of veterans and other claimants to select representatives of their own choosing to represent them in VA matters . . . [A]n individual should not be arbitrarily restricted in retaining an attorney, whether such representation is desired for reasons of personal preference or because of a concern that the claim is likely to be denied . . . . A claimant could well conclude, for example, that some further development of the administrative record in a complex case would be of critical importance while the matter is still before the agency and that an attorney would be better able to so develop the record."

[33] *See Veterans' Administration Adjudication Procedure and Judicial Review Act: Hearing on S. 349 and Related Issues Before the Senate Comm. on Veterans' Affairs*, 97th Cong., 1st Sess. 457, 460-61 (1981) (testimony of Frederick Davis, Past Chairman, ABA Committee on Veterans); *id.* at 462-63 (prepared statement of Frederick Davis); *id.* at 473-74 (testimony of Ronald Simon, National Veterans'

of very little value in resolving the constitutional issues before the Court. *Cf. Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980) ("The less formal types of subsequent legislative history provide an extremely hazardous basis for inferring the meaning of a congressional enactment").[34]

B. The Abject Deference to Congressional Action or Inaction Sought by VA Is Inappropriate in a Procedural Due Process or First Amendment Case

Disclaiming any obligation even to address the district court's factual findings, VA argues that the district court exceeded its authority in determining the procedural requirements guaranteed by the Fifth Amendment's Due Process Clause,[35] and that it

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Law Center); *Veterans' Administration Adjudication Procedure and Judicial Review Act and the VA's Fiscal year 1984 Major Construction Project Proposals: Hearing on S. 636 and Related Bills Before the Senate Comm. on Veterans' Affairs*, 98th Cong., 1st Sess. 141 (1983) (prepared statement of Frederick Davis, Past Chairman, ABA Committee on Veterans).

[34] *See also United States v. United Mine Workers of America*, 330 U.S. 258, 281-82 (1947) (Court declined to rely upon views of several senators regarding construction of Norris-LaGuardia Act); *Selective Service System v. Minnesota Public Interest Research Group*, 104 S.Ct. 3348, 3357 n.15 (1984) (statements by legislators opposed to statute are entitled to "little, if any, weight"); *Weinberger v. Rossi*, 456 U.S. 25, 34-35 (1982) (Court refused to rely upon isolated comments taken out of context from statement by Senate sponsor); *Bread Political Action Committee v. Federal Election Commission*, 455 U.S. 577, 582 n.3 (1982) (personal views of legislators carry little weight).

[35] VA, while not articulating it as an issue presented, also apparently objects to the scope of the preliminary injunction. (BFA 13-14). It is well-established that when a court finds a statute unconstitutional it may properly issue a blanket injunction that prevents its enforcement. *See* Appellees' Opposition to VA's Motion for a Stay filed in this Court on September 24, 1984 (A-214). "[I]nsofar as the relief sought is prohibitory, an action seeking declaratory or injunctive relief . . . on the ground of unconstitutionality of a statute or administrative practice is the archetype of one where class action designation is largely a formality . . . ." *Galvan v. Levine*, 490 F.2d 1255, 1261 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974). Instances in which courts have

should have conclusively assumed the procedural fairness of the VA system based upon supposed legislative "determinations" regarding "the nature and operation of the claims procedure." (BFA 34).[36] VA misapprehends the role of the judiciary in procedural due process and First Amendment cases. While Congress may create property interests, such as the interest in SCDD, the Court must determine what procedures the Constitution guarantees to those who possess such property interests. *Vitek v. Jones*, 445 U.S. 480, 490-91 n.6 (1980); *Arnett v. Kennedy*, 416 U.S. 134, 166-67 (1974) (Powell, J., concurring in part); *Elliott v. Weinberger*, 564 F.2d 1219, 1230 (9th Cir. 1977), *aff'd in part and reversed in part sub nom. California v.*

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enjoined government officials from enforcing an invalid statute or regulation not only against the particular plaintiffs, but against everyone, are legion. *See, e.g., Sandford v. R.L. Coleman Realty Co., Inc.*, 573 F.2d 173, 178-79 (4th Cir. 1978); *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, Florida*, 493 F.2d 799, 812 (5th Cir. 1974); *Galvan v. Levine*, 409 F.2d 1255, 1261 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974); *Tinetti v. Wittke*, 479 F. Supp. 486, 488 (E.D. Wis. 1979), *aff'd*, 620 F.2d 160 (7th Cir. 1980); *Officers for Justice v. Civil Service Commission of City and County of San Francisco*, 371 F. Supp. 1328, 1342 (N.D. Cal. 1973); and *Vulcan Society of New York City Fire Department v. Civil Service Commission of City of New York*, 360 F. Supp. 1265, 1266-67 n. 1 (S.D.N.Y.), *aff'd*, 490 F.2d 387 (2d Cir. 1973). Finally, the district court's factual findings and the uncontroverted evidence before the district court demonstrate that the fee limitation is unconstitutional in all of its applications.

[36] VA also advances the novel argument that the constitutionality of a federal statute cannot depend on the factual record developed by the parties in the district court. (BFA 37). If this argument were correct, then no as-applied constitutional claims could be heard in the courts of original jurisdiction in the federal system. Moreover, the record herein was based upon national discovery, nationwide statistics, and testimony from VA officials throughout the VA system, including its highest levels. Therefore, the record would be similar regardless of the district in which the action were brought. Finally, in the unlikely circumstance that the records or determinations in two cases conflict, the Court conducts such factual reexamination as might be necessary to resolve the conflict. *See Sanitary Refrigerator Co. v. Winters*, 280 U.S. 30, 35-36 (1929).

Yamasaki, 442 U.S. 682 (1979). Similarly, "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment interests are at stake." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978).

VA's articulation of the Court's proper role in procedural due process actions is contradicted by the approach the Court has uniformly taken in procedural due process cases. Due process, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstances." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring). Rather, it is "flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *see also Santosky v. Kramer*, 455 U.S. 745, 754 (1982); *Little v. Streater*, 452 U.S. 1, 5 (1981). In *Santosky v. Kramer*, the Court unambiguously stated its approach to procedural due process cases: "the Court has engaged in a straightforward consideration of the factors identified in *Eldridge* to determine whether a particular standard of proof in a particular proceeding satisfies due process." 455 U.S. at 754. These principles are reflected in *Parham v. J. R.*, 442 U.S. 584 (1979), where the Court examined a "voluminous record" as to the operation of "the Georgia process [for voluntary commitment of children to mental hospitals] in its setting," rather than relying strictly on applicable statutory material. 442 U.S. at 614, 616. The district court relied upon "expert and lay testimony and extensive exhibits" and even visited two of the State's regional mental health hospitals. *Id.* at 588. Similarly, the Court repeatedly relied upon the record in reaching its own decision. *Id.* at 597-98, 614-17. Likewise, in *Morrissey v. Brewer*, addressing procedural due process requirements in parole revocations, the Court considered extensive factual material concerning the circumstances surrounding the revocation of petitioners' paroles, the nature of the setting, the individual and state interests, the administrative system and practices, and the function of parole in the correctional process. 408 U.S. at 472-84.

VA's argument that the Court should disregard the evidence introduced below is misguided, particularly in light of appellees' as-applied due process challenge. Even if Congress had made

findings of fact when it enacted the fee limitation, the district court would have been correct to consider the evidence of record in resolving appellees' claims. As Justice Harlan wrote for the Court in *Leary v. United States*, 395 U.S. 6 (1969), a procedural due process attack upon a statutory presumption: "A statute based upon a legislative declaration of facts is subject to constitutional attack on the ground that the facts no longer exist; in ruling upon such a challenge a court must, of course, be free to re-examine the factual declaration. *See Block v. Hirsh*, 256 U.S. 135, 154-155 (1921); *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 110-114 (1961)." *Id.* at 38 n.68; *see also Turner v. United States*, 396 U.S. 398 (1970) (similar presumption unconstitutional as applied to cocaine, based on Court's assessment of evidence); *Carey v. Population Services International*, 431 U.S. 678, 695 (1977) (ban on selling contraceptives to minors was unconstitutional—evidence did not show that there was a deterrent effect upon sexual activity). Similarly, the Court has held in the First Amendment context that

> [d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake. A legislature appropriately inquires into and may declare the reasons impelling legislative action but the judicial function commands analysis of whether the specific conduct charged falls within the reach of the statute and if so whether the legislation is consonant with the Constitution. Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified.

Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843-44 (1978); *accord, Whitney v. California*, 274 U.S. 357, 378-79 (1927) (Brandeis and Holmes, J.J., concurring), *overruled on other grounds, Brandenburg v. Ohio*, 395 U.S. 444 (1969). Thus, even if Congress had made factual findings in enacting the fee limitation, the district court would have been correct to consider the facts presented to it in resolving appellees' claims.

The cases VA cites as support for the proposition that the courts should defer to congressional "determinations" are inapposite. (BFA 35). They uniformly involve equal protection

and/or substantive due process,[37] *Vance v. Bradley*, 440 U.S. 93, 94-97 (1979); *Oregon v. Mitchell*, 400 U.S. 112 (1970); *Radice v. New York*, 264 U.S. 292 (1924); *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 586, 594 (1939); *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342 (1916), or a claimed unconstitutional taking of property, *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862, 2872 (1984); *Texaco, Inc. v. Short*, 454 U.S. 516, 525-30 (1982). Such cases involve application of the "rational basis" test.[38] This

[37] VA cites Justice Brennan's dissent and concurrence in *Oregon v. Mitchell*, 400 U.S. 112 (1970), for the proposition that a court must defer to Congress's factfinding unless it is "arbitrary," "irrational," or "unreasonable," without mentioning that this statement was made in the context of an equal protection challenge to the age restriction on voting in which the applicable standard was the rational basis test. *See* 400 U.S. at 246-48. As the Court explained in *Vance v. Bradley*, 440 U.S. 93: "In an equal protection case of this type, however, those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision maker." 440 U.S. at 111. This is not the standard here. Moreover, two of the cases cited by VA involved the special deference given Congress when it acts to protect the national security. *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981) (equal protection challenge to male draft); *Communist Party of United States v. Subversive Activities Control Board*, 367 U.S. 1, 102-03 (1961) (registration of Communists).

[38] Even in cases involving the rational basis test, the Court has recognized that litigants are free to mount as-applied challenges. "Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, [citation omitted] and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the Court that those facts have ceased to exist. [Citation omitted]. Similarly we recognize that the constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason . . . [citations omitted] though the effect of such proof depends on the relevant circumstances of each case . . . ." *United States v. Carolene Products Co.*, 304 U.S. 144, 153-54 (1938).

is not the appropriate standard in procedural due process or First Amendment cases.[39]

In sum, VA's contention that the Court should have resorted solely to material outside the record, and more particularly to VA's selective rendition of excerpts from legislative proceedings, is completely antithetical to the responsibility of courts in due process and First Amendment cases.[40]

[39] None of the cases cited by VA stands for the proposition that the Court should defer to Congress in determining which process is due applicants for a statutory entitlement. (BFA 37 n.38). *Middendorf v. Henry*, 425 U.S. 25 (1976), the only procedural due process case VA relies upon, involved summary courts-martial, and the Court relied upon the traditional deference given to Congress based upon the need for discipline and duty in the military. 425 U.S. at 43. *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 102 (1972), was not even a procedural due process case. Justice White's concurrence and dissent in *Arnett v. Kennedy*, 416 U.S. 134, 202 (1974), states only that "to some extent, the Court must share with Congress . . . a role in defining constitutional requirements."

[40] VA implies that the fairness of the fee limitation is a political question for Congress to decide. (BFA 43-46). This argument is unpersuasive. "No policy underlying the political question doctrine suggests that Congress or the Executive, or both acting in concert and in compliance with Art. I, can decide the constitutionality of a statute; that is a decision for the courts." *Immigration and Naturalization v. Chadha*, 103 S. Ct. 2764, 2779 (1983).

CONCLUSION

For the foregoing reasons, the district court did not abuse its discretion in holding that appellees were likely to succeed on the merits of their claims that the fee limitation, as applied, violates their procedural due process and First Amendment rights. The district court properly enjoined the enforcement of the $10.00 fee limitation applicable to SCDD claims pending trial on the merits, and the Court should affirm.

Dated: March 7, 1985

Respectfully submitted,

ROBERT D. RAVEN
GORDON P. ERSPAMER*
MICHAEL F. RAM
MORRISON & FOERSTER

By _____
GORDON P. ERSPAMER

One Market Plaza
Spear Street Tower
San Francisco, CA 94105
Telephone: (415) 777-6000
Attorneys for Appellees

**Counsel of Record*

APPENDIX H

STATUTES INVOLVED

UNITED STATES CODE
TITLE 38 — VETERANS' BENEFITS
CHAPTER 3 — VETERANS' ADMINISTRATION; OFFICERS AND EMPLOYEES
SUBCHAPTER II — ADMINISTRATOR OF VETERANS' AFFAIRS

§ 211. Decisions by Administrator; opinions of Attorney General

(a) On and after October 17, 1940, except as provided in sections 775, 784, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

(b) The Administrator may require the opinion of the Attorney General on any question of law arising in the administration of the Veterans' Administration.

(Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1115; Pub. L. 89-214, § 1(b), Sept. 29, 1965, 79 Stat. 886; Pub. L. 89-358, § 4(h), Mar. 3, 1966, 80 Stat. 24; Pub. L. 91-376, § 8(a), Aug. 12, 1970, 84 Stat. 790.)

UNITED STATES CODE
CHAPTER 11 — COMPENSATION FOR SERVICE-CONNECTED DISABILITY OR DEATH
SUBCHAPTER II — WARTIME DISABILITY COMPENSATION

§ 310. Basic entitlement

For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is the result of the veteran's own willful misconduct.

(Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1119.)

§ 314. Rates of wartime disability compensation

For the purposes of section 310 of this title—

(a) if and while the disability is rated 10 per centum the monthly compensation shall be $62;

(b) if and while the disability is rated 20 per centum the monthly compensation shall be $114;

(c) if and while the disability is rated 30 per centum the monthly compensation shall be $173;

(d) if and while the disability is rated 40 per centum the monthly compensation shall be $249;

(e) if and while the disability is rated 50 per centum the monthly compensation shall be $352;

(f) if and while the disability is rated 60 per centum the monthly compensation shall be $443;

(g) if and while the disability is rated 70 per centum the monthly compensation shall be $559;

(h) if and while the disability is rated 80 per centum the monthly compensation shall be $648;

(i) if and while the disability is rated 90 per centum the monthly compensation shall be $729;

(j) if and while the disability is rated as total the monthly compensation shall be $1,213;

SUBCHAPTER III — WARTIME DEATH COMPENSATION

§ 321. Basic entitlement

The surviving spouse, child, or children, and dependent parent or parents of any veteran who died before January 1, 1957 as the result of injury or disease incurred in or aggravated by active military, naval, or air service, in line of duty, during a period of war, shall be entitled to receive compensation at the monthly rates specified in section 322 of this title.

(Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1122; Pub. L. 92-197, § 6, Dec. 15, 1971, 85 Stat. 662; Pub. L. 94-433, title IV, § 404(12), Sept. 30, 1976, 90 Stat. 1378.)

§ 322. Rates of wartime death compensation

(a) The monthly rates of death compensation shall be as follows:

(1) Surviving spouse but no child, $87;

(2) Surviving spouse with one child, $121 (with $29 for each additional child);

(3) No surviving spouse but one child, $67;

(4) No surviving spouse but two children, $94 (equally divided);

(5) No surviving spouse but three children, $122 (equally divided) (with $23 for each additional child, total amount to be equally divided);

(6) Dependent parent, $75;

(7) Both dependent parents, $40 each.

SUBCHAPTER IV — PEACETIME DISABILITY COMPENSATION

§ 331. Basic entitlement

For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during other than a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is the result of the veteran's own willful misconduct.

(Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1122.)

§ 334. Rates of peacetime disability compensation

For the purposes of section 331 of this title, the compensation payable for the disability shall be that specified in section 314 of this title.

(Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1123; Pub. L. 92-328, title I, § 108(a), June 30, 1972, 86 Stat. 396.)

SUBCHAPTER V — PEACETIME DEATH COMPENSATION

§ 341. Basic entitlement

The surviving spouse, child or children, and dependent parent or parents of any veteran who died before January 1, 1957, as the

result of injury or disease incurred in or aggravated by active military, naval, or air service, in line of duty, during other than a period of war, shall be entitled to receive compensation as hereinafter provided in this subchapter.

(Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1123; Pub. L. 92-197, § 6, Dec. 15, 1971, 85 Stat. 662; Pub. L. 94-433, title IV, § 404(18), Sept. 30, 1976, 90 Stat. 1379.)

§ 342. Rates of peacetime death compensation

For the purposes of section 341 of this title, the monthly rates of death compensation payable shall be those specified in section 322 of this title.

(Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1124; Pub. L. 93-295, title II, § 206(a), May 31, 1974, 88 Stat. 183.)

§ 355. Authority for schedule for rating disabilities

The Administrator shall adopt and apply a schedule of ratings of reductions in earning capacity from specific injuries or combination of injuries. The ratings shall be based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations. The schedule shall be constructed so as to provide ten grades of disability and no more, upon which payments of compensation shall be based, namely, 10 per centum, and total, 20 per centum, 30 per centum, 40 per centum, 50 per centum, 60 per centum, 70 per centum, 80 per centum, 90 per centum, and total, 100 per centum. The Administrator shall from time to time readjust this schedule of ratings in accordance with experience.

(Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1125.)

CHAPTER 57 — RECORDS AND INVESTIGATIONS
SUBCHAPTER II — INVESTIGATIONS

§ 3311. Authority to issue subpenas

For the purposes of the laws administered by the Veterans' Administration, the Administrator, and those employees to whom the Administrator may delegate such authority, to the

extent of the authority so delegated, shall have the power to issue subpenas for and compel the attendance of witnesses within a radius of one hundred miles from the place of hearing, to require the production of books, papers, documents, and other evidence, to take affidavits, to administer oaths and affirmations, to aid claimants in the preparation and presentation of claims, and to make investigations and examine witnesses upon any matter within the jurisdiction of the Veterans' Administration. Any person required by such subpena to attend as a witness shall be allowed and paid the same fees and mileage as are paid witnesses in the district courts of the United States.

(Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1237.)

UNITED STATES CODE
CHAPTER 59—AGENTS AND ATTORNEYS

§ 3402. Recognition of representatives of organizations

(a) (1) The Administrator may recognize representatives of the American National Red Cross, the American Legion, the Disabled American Veterans, the United Spanish War Veterans, the Veterans of Foreign Wars, and such other organizations as he may approve, in the preparation, presentation, and prosecution of claims under laws administered by the Veterans' Administration.

(2) The Administrator may, in his discretion, furnish, if available, space and office facilities for the use of paid full-time representatives of national organizations so recognized.

(b) No individual shall be recognized under this section—

(1) unless he has certified to the Administrator that no fee or compenstaion of any nature will be charged any individual for services rendered in connection with any claim; and

(2) unless, with respect to each claim, such individual has filed with the Administrator a power of attorney, executed in such manner and form as the Administrator may prescribe.

(c) Service rendered in connection with any such claim, while not on active duty, by any retired officer, warrant officer, or enlisted man of the Armed Forces recognized under this section shall not be a violation of sections 203, 205, 206 or 207 of title 18.

(Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1238; Pub. L. 91-24, § 12(b), June 11, 1969, 83 Stat. 34.)

§ 3403. Recognition with respect to particular claims

The Administrator may recognize any individual for the preparation, presentation, and prosecution of any particular claim for benefits under any of the laws administered by the Veterans' Administration if—

(1) such individual has certified to the Administrator that no fee or compensation of any nature will be charged any individual for services rendered in connection with such claim; and

(2) such individual has filed with the Administrator a power of attorney, executed in such manner and in such form as the Administrator may prescribe.

(Pub. L. 85-857, Sept. 12, 1958, 72 Stat. 1238.)

§ 3404. Recognition of agents and attorneys generally

(a) The Administrator may recognize any individual as an agent or attorney for the preparation, presentation, and prosecution of claims under laws administered by the Veterans' Administration. The Administrator may require that individuals, before being recognized under this section, show that they are of good moral character and in good repute, are qualified to render claimants valuable service, and otherwise are competent to assist claimants in presenting claims.

(b) The Administrator, after notice and opportunity for a hearing, may suspend or exclude from further practice before the Veterans' Administration any agent or attorney recognized under this section if he finds that such agent or attorney—

(1) has engaged in any unlawful, unprofessional, or dishonest practice;

(2) has been guilty of disreputable conduct;

(3) is incompetent;

(4) has violated or refused to comply with any of the laws administered by the Veterans' Administration, or with any of the regulations or instructions governing practice before the Veterans' Administration; or

(5) has in any manner deceived, misled, or threatened any actual or prospective claimant.

(c) The Administrator shall determine and pay fees to agents or attorneys recognized under this section in allowed claims for monetary benefits under laws administered by the Veterans' Administration. Such fees—

(1) shall be determined and paid as prescribed by the Administrator;

(2) shall not exceed $10 with respect to any one claim; and

(3) shall be deducted from monetary benefits claimed and allowed.

(Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1238.)

§ 3405. Penalty for certain acts

Whoever (1) directly or indirectly solicits, contracts for, charges, or receives, or attempts to solicit, contract for, charge, or receive, any fee or compensation except as provided in sections 3404 or 784 of this title, or (2) wrongfully withholds from any claimant or beneficiary any part of a benefit or claim allowed and due him, shall be fined not more than $500 or imprisoned at hard labor for not more than two years, or both.

(Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1239.)

PART V—BOARDS AND DEPARTMENTS
CHAPTER 71—BOARD OF VETERANS' APPEALS

§ 4001. Composition of Board of Veterans' Appeals

(a) There shall be in the Veterans' Administration a Board of Veterans' Appeals (hereafter in this chapter referred to as the "Board") under the administrative control and supervision of a chairman directly responsible to the Administrator. The Board shall consist of a Chairman, a Vice Chairman, such number (not more than fifty) of associate members as may be found necessary, and such other professional, administrative, clerical, and stenographic personnel as are necessary in conducting hearings and considering and disposing of appeals properly before the Board.

(b) Members of the Board (including the Chairman and Vice Chairman) shall be appointed by the Administrator with the approval of the President.

(Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1240.)

§ 4003. Determinations by the Board

(a) The determination of the section, when unanimously concurred in by the members of the section shall be the final determination of the Board, except that the Board on its own motion may correct an obvious error in the record, or may upon the basis of additional official information from the service department concerned reach a contrary conclusion.

(b) When there is a disagreement among the members of the section the concurrence of the Chairman with the majority of members of such section shall constitute the final determination of the Board, except that the Board on its own motion may correct an obvious error in the record, or may upon the basis of additional official information from the service department concerned reach a contrary conclusion.

(Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1241.)

§ 4004. Jurisdiction of the Board

(a) All questions on claims involving benefits under the laws administered by the Veterans' Administration shall be subject to one review on appeal to the Administrator. Final decisions on such appeals shall be made by the Board.

(b) When a claim is disallowed by the Board, it may not thereafter be reopened and allowed, and no claim based upon the same factual basis shall be considered; however, where subsequent to disallowance of a claim, new and material evidence in the form of official reports from the proper service department is secured, the Board may authorize the reopening of the claim and review of the former decision.

(c) The Board shall be bound in its decisions by the regulations of the Veterans' Administration, instructions of the Administrator, and the precedent opinions of the chief law officer.

(d) The decisions of the Board shall be in writing and shall contain findings of fact and conclusions of law separately stated.

(Pub L. 85-857, Sept. 2 1958, 72 Stat. 1241; Pub. L. 87-97, § 1, July 20, 1961, 75 Stat. 215.)

§ 4005. Filing of notice of disagreement and appeal

(a) Appellate review will be initiated by a notice of disagreement and completed by a substantive appeal after a statement of the case is furnished as prescribed in this section. Each appellant will be accorded hearing and representation rights pursuant to the provisions of this chapter and regulations of the Administrator.

(b)(1) Except in the case of simultaneously contested claims, notice of disagreement shall be filed within one year from the date of mailing of notice of the result of initial review or determination. Such notice, and appeals, must be in writing and be filed with the activity which entered the determination with which disagreement is expressed (hereafter referred to as the "agency of original jurisdiction"). A notice of disagreement

postmarked before the expiration of the one-year period will be accepted as timely filed.

(2) Notices of disagreement, and appeals, must be in writing and may be filed by the claimant, his legal guardian, or such accredited representative, attorney, or authorized agent as may be selected by him. Not more than one recognized organization, attorney, or agent will be recognized at any one time in the prosecution of a claim.

(c) If no notice of disagreement is filed in accordance with this chapter within the prescribed period, the action or determination shall become final and the claim will not thereafter be reopened or allowed, except as may otherwise be provided by regulations not inconsistent with this title.

(d)(1) Where the claimant, or his representative, within the time specified in this chapter, files a notice of disagreement with the decision of the agency of original jurisdiction, such agency will take such development or review action as it deems proper under the provisions of regulations not inconsistent with this title. If such action does not resolve the disagreement either by granting the benefit sought or through withdrawal of the notice of disagreement, such agency will prepare a statement of the case consisting of—

(A) A summary of the evidence in the case pertinent to the issue or issues with which disagreement has been expressed;

(B) A citation or discussion of the pertinent law, regulations, and, where applicable, the provisions of the Schedule for Rating Disabilities;

(C) The decision on such issue or issues and a summary of the reasons therefor.

(2) A statement of the case, as required by this subsection, will not disclose matters that would be contrary to section 3301 of this title or otherwise contrary to the public interest. Such matters may be disclosed to a designated representative unless the relationship between the claimant and the representative is

such that disclosure to the representative would be as harmful as if made to the claimant.

(3) Copies of the "statement of the case" prescribed in paragraph (1) of this subsection will be submitted to the claimant and to his representative, if there is one. The claimant will be afforded a period of sixty days from the date the statement of the case is mailed to file the formal appeal. This may be extended for a reasonable period on request for good cause shown. The appeal should set out specific allegations of error of fact or law, such allegations related to specific items in the statement of the case. The benefits sought on appeal must be clearly identified. The agency of original jurisdiction may close the case for failure to respond after receipt of the statement of the case, but questions as to timeliness or adequacy of response shall be determined by the Board of Veterans' Appeals.

(4) The appellant will be presumed to be in agreement with any statement of fact contained in the statement of the case to which no exception is taken.

(5) The Board of Veterans' Appeals will base its decision on the entire record and may dismiss any appeal which fails to allege specific error of fact or law in the determination being appealed.

(Added Pub. L. 87-666, § 1, Sept. 19, 1962, 76 Stat. 553.)

§ 4009. Independent medical opinions

(a) When, in the judgment of the Board, expert medical opinion, in addition to that available within the Veterans' Administration, is warranted by the medical complexity or controversy involved in an appeal case, the Board is authorized to secure an advisory medical opinion from one or more independent medical experts who are not employees of the Veterans' Administration.

(b) The Administrator shall make necessary arrangements with recognized medical schools, universities, or clinics to furnish such advisory medical opinions at the request of the Chairman of the Board. Such arrangement will provide that the actual selection of the expert or experts to give the advisory opinion in any individual case will be made by an appropriate official of such institution.

(Added Pub. L. 87-671, § 1, Sept. 19, 1962, 76 Stat. 557.)

CODE OF FEDERAL REGULATIONS
TITLE 38

PART 3 — ADJUDICATION
Subpart A — Pension, Compensation, and Dependency and Indemnity Compensation

§ 3.102 Reasonable Doubt.

It is the defined and consistently applied policy of the Veterans Administration to administer the law under a broad interpretation, consistent, however, with the facts shown in every case. When, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant. By reasonable doubt is meant one which exists by reason of the fact that the evidence does not satisfactorily prove or disprove the claim, yet a substantial doubt and one within the range of probability as distinguished from pure speculation or remote possibility. It is not a means of reconciling actual conflict or a contradiction in the evidence; the claimant is required to submit evidence sufficient to justify a belief in a fair and impartial mind that his claim is well grounded. Mere suspicion or doubt as to the truth of any statements submitted, as distinguished from impeachment or contradiction by evidence or known facts, is not a justifiable basis for denying the application of the reasonable doubt doctrine if the entire, complete record otherwise warrants invoking this doctrine. The reasonable doubt doctrine is also applicable even in the absence of official records, particularly if the basic incident allegedly arose under combat, or similarly strenuous conditions, and is consistent with the probable results of such known hardships.

[26 FR 1568, Feb. 24, 1961]

§ 3.103 Due process — procedural and appellate rights with regard to disability and death benefits and related relief.

(a) *Statement of policy.* Proceedings before the Veterans

Administration are ex parte in nature. It is the obligation of the Veterans Administration to assist a claimant in developing the facts pertinent to his claim and to render a decision which grants him every benefit that can be supported in law while protecting the interests of the Government. This principle and the other provisions of this section apply to all claims for benefits and relief and decisions thereon within the purview of this part.

(b) *Submission of evidence.* Any evidence whether documentary, testimonial, or in other form, offered by a claimant in support of a claim and any issue he may raise and contention and argument he may offer with respect thereto are to be included in the records.

(c) *Hearings.* Upon request a claimant is entitled to a hearing at any time on any issue involved in a claim within the purview of this part. The Veterans Administration will provide the place of hearing in the Veterans Administration office having original jurisdiction over the claim or at the Veterans Administration office nearest his home having adjudicative functions and will provide Veterans Administration personnel who have original determinative authority of such issues to be responsible for the preparation of the transcript; however, further expenses involved will be the responsibility of the claimant. The claimant is entitled to produce witnesses and all testimony will be under oath or affirmation. The purpose of such a hearing is to permit the claimant to introduce into the record in person any evidence available to him which he may consider material and any arguments and contentions with respect to the facts and applicable law which he may consider pertinent. It is the responsibility of the Veterans Administration personnel conducting the hearing to explain fully the issues and to suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to his position. It is their further responsibility to establish and preserve the record. Because of this and to assure clarity and understanding therein, questions which are directed to the claimant and to witnesses are to be framed to explore fully the basis for claimed entitlement rather than with an intent to refute evidence and to discredit testimony. In cases in which the nature, origin, or degree of disability is in issue, the claimant may

request visual examination by the physician designated by the Veterans Administration as a participant in the hearing and his observations will be read into the record.

(d) *Representation.* Within the provisions and criteria of § § 14.626 through 14.663 of this chapter a claimant is entitled to representation of his choice at every stage in the prosecution of a claim.

(e) *Notification of decisions.* The claimant will be notified of any decision affecting the payment of benefits or granting relief. Notice will include the reason for the decision and the date it will be effectuated as well as the right to a hearing subject to paragraph (c) of this section. The notification will also advise the claimant of his right to initiate an appeal by filing a Notice of Disagreement which will entitle him to a Statement of the case for his assistance in perfecting his appeal. Further, the notice will advise him of the periods in which an appeal must be initiated and perfected. (See Part 19, Subpart B of this chapter on appeals.)

[37 FR 14780, July 25, 1972]

PART 14 — LEGAL SERVICES, GENERAL COUNSEL

§ 14.634 Fees and expenses

Accredited representatives of national, State or other recognized organizations and individuals recognized for a particular claim shall not be entitled to receive fees. Attorneys and agents are entitled to receive fees as provided by statute. (38 U.S.C. 3404(c)).

(a) *Amount of fees.* For the successful prosecution of claims, attorneys and agents may receive the fee permitted by statute. The fee will be paid to the attorney or agent of record at the time of allowance, by deduction from the benefit allowed, after approval by the Veterans Administration. Questions concerning the amount or proper payee of fees allowed will be resolved by the District Counsel, or designee, who will consider the quality, nature, and extent of the services.

(b) *Expenses.* Without regard to entitlement to fees, an agent, attorney, or other person who incurs an expense in the prosecution of a claim, may submit a sworn itemized account of the expense to the Veterans Administration. It will be retained in the claims folder as part of the permanent record. Payment of expenses is the responsibility of the claimant; however, before demanding or receiving reimbursement from the claimant, the expense shall be approved by the District Counsel, or designee. Notice of the action taken shall be transmitted to the requestor by the service handling the claim. (38 U.S.C. 3404).

PART 19 — BOARD OF VETERANS APPEALS
Subpart A — Appeals — General

§ 19.1 Appellate jurisdiction.

(a) *General.* All questions on claims involving benefits under the laws administered by the Veterans Administration are subject to review on appeal to the Administrator of Veterans Affairs, decisions in such cases to be made by the Board of Veterans Appeals. In its decisions, the Board is bound by the regulations of the Veterans Administration, instructions of the Administrator and precedent opinions of the General Counsel. The Board may exercise the same authority as the department having original jurisdictional responsibility. (38 U.S.C. 4004)

COMMENCEMENT OF APPEAL

§ 19.117 Rule 17; What constitutes an appeal.

An appeal consists of a timely filed notice of disagreement in writing and, after a statement of the case has been furnished, a timely filed substantive appeal. (38 U.S.C. 4005)

§ 19.118 Rule 18; Notice of disagreement

A written communication from a claimant or the representative expressing dissatisfaction or disagreement with an adjudicative determination of an agency of original jurisdiction (the Veterans Administration regional office, medical center or clinic which notified the claimant of the action taken) will constitute a notice of disagreement. The notice of disagreement should be in

terms which can be reasonably construed as a desire for review of that determination. It need not be expressed in any special wording. (38 U.S.C. 4005)

§ 19.119 Rule 19; Action by agency of original jurisdiction on notice of disagreement.

(a) *Preliminary action.* When a notice of disagreement is timely filed, the agency of original jurisdiction may develop and review the claim again. (38 U.S.C. 4005(d)(1))

(b) *Statement of the case.* If no preliminary action is required or when it is completed, the agency of original jurisdiction will prepare a statement of the case pursuant to Rule 20 (§ 19.120), unless the issue or issues are resolved by granting the benefits sought in the appeal or the notice of disagreement is withdrawn by the appellant or the representative. (38 U.S.C. 4005 (d)(i))

§ 19.120 Rule 20; Statement of the case.

(a) *Purpose.* The statement of the case should provide the appellant notice of those facts and applicable laws and regulations upon which the agency of original jurisdiction based its determination of the issue or issues. It should be complete enough to allow the appellant to present written and/or oral arguments before the Board of Veterans Appeals (38 U.S.C. 4005(d)(1))

(b) *Contents.* A statement of the case shall contain:

(1) A summary of the evidence in the case relating to the issue or issues with which the appellant or representative has expressed disagreement.

(2) A summary of the applicable law and regulations, with appropriate citations.

(3) The determination of the agency of original jurisdiction on each issue and the reasons for such determination with respect to which disagreement has been expressed. (38 U.S.C. 4005(d)(1))

§ 19.123 Rule 23; Substantive appeal.

(a) *Substantive appeal.* A substantive appeal shall consist of a properly completed VA Form 1-9, Appeal to Board of Veterans Appeals, or correspondence containing the necessary information. The appeal should set out specific arguments relating to errors of fact or law. To the extent feasible the argument should be related to specific items in the statement of the case. This is the last action the appellant needs to take to perfect the appeal. The Board will construe such arguments in a liberal manner for purposes of determining whether they raise issues on appeal. (38 U.S.C. 4005(d)(4)-(5))

(b) *Certification.* Following receipt of the substantive appeal, the agency of original jurisdiction will certify the case to the Board of Veterans Appeals. Certification is accomplished by the execution of VA Form 1-8, Certification of Appeal. Its purpose is to identify the issues for appellate consideration and to serve as a check list for the originating agency to ensure that the appeals development procedures have been adequate, particularly as they affect the appellant's due process rights. (38 U.S.C. 4005)

§ 19.124 Rule 24; Closing — failure to respond to statement of the case.

The agency of original jurisdiction may close the appeal without notice to an appellant for failure to respond to a statement of the case within the period allowed. However, if a response is subsequently received within the 1-year appeal period (except for contested claims), the appeal will be considered to be reactivated. (38 U.S.C. 4005(d)(3))

§ 19.126 Rule 26; Dismissal.

Appeals which fail to allege specific error of fact or law in the determination being appealed may be dismissed. The appellant and/or representative will be notified of the dismissal action. (38 U.S.C 4005(d)(5), 4008)

§ 19.129 Rule 29; Time limit for filing.

(a) *Notice of disagreement.* A notice of disagreement shall be filed within 1 year from the date of mailing of notification of

the initial review and determination; otherwise, that determination will become final. The date of the letter of notification will be considered the date of mailing for purposes of determining whether a timely appeal has been filed. (38 U.S.C. 4005 (b)(1))

(b) *Substantive appeal.* A substantive appeal shall be filed within 60 days from the date of mailing of the statement of the case, or within the remainder of the 1-year period from the date of mailing of the notification of the initial review and determination being appealed, whichever period ends later. The date of the statement of the case itself will be considered the date of mailing for purposes of determining whether a timely appeal has been filed. Where a supplemental statement of the case is furnished, a period of 30 days will be allowed for response. (38 U.S.C. 4005 (b)(1),(d)(3))

HEARINGS

§ 19.157 Rule 57; General.

(a) *Right to a hearing.* A hearing on appeal shall be granted if an appellant or a representative expresses a desire to appear in person. (38 U.S.C. 4002)

(b) *Purpose of hearing.* The purpose of a hearing is to receive argument and testimony relevant and material to the appellate issue. (38 U.S.C. 4002)

(c) *Nonadversary proceedings.* Hearings conducted by and for the Board are ex parte in nature and nonadversary. Parties to the hearing will be permitted to ask questions, including follow-up questions, of all witnesses but cross-examination will not be permitted. Proceedings will not be limited by legal rules of evidence, but reasonable bounds of relevancy and materiality will be maintained. (38 U.S.C. 4002)

§ 19.165 Rule 65; Witnesses.

(a) *General.* The testimony of witnesses will be heard. An appellant or a representative may arrange for the voluntary appearance of any witnesses he/she desires, but the Board will not require the appearance of any Veterans Administration official or other person. (38 U.S.C. 4002)

(b) *Testimony under oath.* All testimony must be given under oath unless excused because of religious principles or other good cause. If the witness declines to take an oath, he/she should be informed that the testimony will be permitted on affirmation. The witness should then be requested to make a solemn declaration as to the truth of the testimony about to be given. The witness may use such words as he/she considers binding on his/her conscience. Administration of the oath for the sole purpose of presenting contentions and argument is not required. (38 U.S.C 4002)

§ 19.168 Rule 68; Recorded hearing.

(a) *Board of Veterans Appeals.* The hearing proceedings before a Section of the Board shall be recorded and a tape of these proceedings shall be on file at the Board of Veterans Appeals. A written transcript or a copy of the tape may be furnished without cost to the appellant or representative if so requested at the time of or prior to the hearing; otherwise a charge may be made in accordance with § 1.577 of this title.

(b) *Field offices.* The hearing proceedings before field office personnel after the filing of a notice of disagreement shall be recorded and a copy of the complete transcript incorporated as a permanent part of the claims folder. A copy may be furnished without cost to the appellant or representative if so requested at the time of or prior to the hearing; otherwise a charge may be made in accordance with § 1.577 of this title. (38 U.S.C. 4002)

§ 19.177 Rule 77; Independent medical expert opinions.

When, in the judgment of the Board, additional medical opinion is warranted by the medical complexity or controversy involved in an appeal, the Board may obtain an advisory medical opinion from one or more medical experts who are not employees of the Veterans Administration. Opinions will be secured, as requested by the Chairman of the Board, from recognized medical schools, universities, clinics or medical institutions with which arrangements for such opinions have been made by the Administrator of Veterans Affairs. An appropriate official of the institution will select the individual expert(s) to give an opinion. (38 U.S.C. 4009)

§ 19.182 Rule 82; Remand for further development.

(a) *General.* When, during the course of review, it is determined that further evidence or clarification of the evidence or correction of a procedural defect is essential for a proper appellate decision, the section of the Board shall remand the case to the agency of original jurisdiction, specifying the further development to be undertaken. (38 U.S.C. 4002, 4004(a))

(b) *Review by agency of original jurisdiction.* Where the development results in additional evidence, a supplemental statement of the case will be furnished the appellant and any representative, and the records will again be reviewed by the agency of original jurisdiction. A supplemental statement of the case will not be required where the only purpose of the remand is to assemble records previously considered by the agency of original jurisdiction. If the case is remanded to cure a procedural defect, the Board may also require issuance of a supplemental statement of the case to assure full notification to the appellant of the status of the case. (38 U.S.C. 4005(d)(1)

(c) *Resubmission to Board of Veterans Appeals.* Unless the benefits at issue on appeal are awarded upon review by the agency of original jurisdiction, the records will be returned to the Board of Veterans Appeals for completion of appellate review. Remanded cases will not be closed for failure to respond to the supplemental statement of the case. (38 U.S.C. 4005(d))

RECONSIDERATION

§ 19.185 Rule 85; When reconsideration is accorded.

Reconsideration of an appellate decision may be accorded at any time by the Board of Veterans Appeals on request by the appellant or his/her representative or on the Board's own motion:

(a) Upon allegation of obvious error of fact or law; or

(b) Upon discovery of new and material evidence in the form of records or reports of the military, naval or air service department concerned or officially corrected service department record. (38 U.S.C. 4003, 4004(b))

§ 19.186 Rule 86; Filing and disposition of a motion for reconsideration.

(a) *Application requirements.* A motion for reconsideration shall set forth clearly and specifically the alleged obvious error(s) of fact or law in the decision of the Board or other appropriate basis for requesting reconsideration. This motion may be filed at any time. (38 U.S.C. 4003, 4008)

(b) *Disposition.* The Chairman or his/her designee will review the sufficiency of the allegations set forth in the motion.

(1) *Motion denied.* The appellant and representative will be notified if the motion is denied. The notification will be signed by the Chairman and will include reasons why the allegations are found insufficient. This constitutes final disposition of the motion.

(2) *Motion allowed.* If the motion is allowed, the Chairman or his/her designee will assign a reconsideration panel according to Rule 90 (§ 19.190). The appellant and representative will be so notified. At the time of notification the appellant and the representative will be given a period of 60 days to present additional arguments. (38 U.S.C. 4003, 4008)

§ 19.187 Rule 87; Evidence considered.

Reconsideration of an appellate decision for error shall be limited to review of the evidence of record at the time the decision was entered, but the Board may secure additional medical or legal opinion. Additional evidence, apart from service department records, submitted following the decision being reconsidered is subject to the provisions of Rule 94 (§ 19.194) concerning new and material evidence. (38 U.S.C. 4003, 4009)

APPENDIX I

SYNOPSIS OF CONGRESSIONAL FACTFINDING AND ENACTMENTS CONCERNING THE FEE LIMITATION

(This appendix will supplement Appendix E by illustrating the lack of congressional factfinding concerning the fee limitation, including the lack of fact finding concerning its application to the modern VA system for adjudicating SCDD claims.)

The fee limitation was first enacted on July 14, 1862. Abraham Lincoln was President and the Emancipation Proclamation had not yet been issued. The Civil War was being waged with swords, rifles, and cannonballs—Agent Orange and atomic weapons were still a century away. The fee limitation was part of a bill entitled "An Act to Grant Pensions," which authorized a fee of $5 for attorneys who helped veterans to execute the simple pension application. Act of July 14, 1862, ch. 166, § 6, 12 Stat. 566, 568. The purpose of the statute was to protect veterans from unscrupulous attorneys who were charging exorbitant fees for the purely clerical task of filling out the necessary forms. (*See* MA App. E).

During the next five decades, the fee limitation was re-enacted on several occasions as part of the recodification or revision of veterans' pension benefits. On such occasions, Congess contemplated that attorneys' services would consist solely of helping veterans to complete basic pension claim forms. Significantly, in amending the War Risk Insurance Program in 1918, Congress drew a distinction between the purely clerical function of completing pension claim forms and the more complex tasks performed by attorneys in litigated insurance claims. Thus, the act authorized payment of attorneys' fees equal to five percent of the amount recovered in litigated insurance cases, while it limited fees for assistance in filing pension claims to $3. Act of May 20, 1918, Pub. L. No. 151, 40 Stat. 555. Congressman Treadway explained the fee limitation:

> Mr. Treadway: May I call the gentleman's attention to the fact that there are two places where attorneys or claim agents are recognized? One is the preparation of the papers

> and the execution of necessary papers, where not to exceed $3 may be charged. That is simply a *clerical service.* Then, you will see the bill also recognizes attorneys in connection with a suit [in litigated insurance cases].

56 Cong. Rec. H5223 (daily ed. April 17, 1918) (emphasis added). Congressman Snook reiterated this point:

> Mr. Snook: Now, this bill is so drawn . . . that these attorneys cannot collect a fee for services in any one of these cases, except under regulations to be formulated and promulgated by the Bureau of War-Risk Insurance. It was suggested to the committee, however, that it might be necessary, and probably was necessary, that some compensation should be allowed to someone for preparing the papers for applicants, and so the fee for that purpose was fixed in the bill at $3.00. . . .
>
> Mr. Linthicum: The gentleman says "preparing papers"; that is merely filling up a blank.

56 Cong. Rec. H5223 (daily ed. April 17, 1918) (emphasis added). Similarly, the House Committee on Interstate and Foreign Commerce reported:

> As a fee for the preparation of papers which the bureau will send these people, the committee has fixed a maximum charge of $3, which we believe is ample for the work that will be necessitated in filling out these papers.

H.R. Rep. No. 471, 65th Cong., 2d Sess. 2 (1918).

In 1924, the fee limitation was raised from $3 to $10. World War Veterans' Act, Pub. L. No. 242, § 500, 43 Stat. 607, 628 (1924). The statute specifically applied to "preparation and execution of the necessary papers." Except to state the increase from $3 to $10, the committee reports and congressional debates did not mention the fee limitation. *See* H.R. Rep. Nos. 589, 763, S. Rep. No. 397, 68th Cong. 1st Sess. (1924). In 1925, the fee limitation for assistance in "preparation and execution of the necessary papers" was mechanically re-enacted as part of a recodification of existing veterans' law. Act of March 24, 1925, Pub. L. No. 628, § 500, 43 Stat. 1302, 1311. It was not mentioned in the report of the House Committee on World War Veterans

Legislation, H.R. Rep. No. 1518, 68th Cong., 2d Sess. (1925), nor in the Congressional debates. In fact, Congressman Browning stated of the bill, H.R. 12308, "The medical service is practically the only new thing in it. . . ." Cong. Rec. H5068 (daily ed. Feb. 18, 1925). In the final House debate, when asked "what is left" after the Senate amendments, Congressman Johnson explained:

> There are some administrative provisions that will perhaps be of some benefit like the interpleader in reference to the payment of reinsurance. There are some other elements of the bill that will be of benefit to the men who have been guilty of what is known as misconduct, but outside of those matters I think there is nothing.

Cong. Rec. H5454 (daily ed. March 3, 1925).

In 1936, the fee limitation was re-enacted as part of a recodification of existing veterans' law. Act of June 29, 1936, Pub. L. No. 844, § 201, 49 Stat. 2031, 2032. It was part of an act to "effect uniform provisions in laws administered by the Veterans' Administration . . . ." The sole mention of the fee limitation by the House Committee on World War Veterans Legislation was in its explanation that the purpose of the bill was to "codify, consolidate, and make uniform certain sections of present laws and regulations relating to the administration of benefits under the Veterans' Administration," including the fee limitation. H.R. Rep. No. 2899, 74th Cong., 2d Sess. 1-2 (1936). This statement, along with the rest of the House Committee's explanation for the bill, was excerpted in the report of the Senate Finance Committee, which made no other mention of the fee limitation. S. Rep. No. 2325, 74th Cong. 2d Sess. (1936). Again, the fee limitation was never mentioned in the congressional debates.

Significantly, no mention was made in Congress in 1936 of the great changes that had been made in veterans' compensation as part of President Roosevelt's New Deal. The VA had been created in 1930. Act of July 3, 1930, Pub. L. No. 536, § 1, 46 Stat. 1016. Then, in 1933, President Roosevelt made a number of changes which rendered the VA adjudication system much more complex. The basic entitlement to SCDD was created by Executive Order on June 6, 1933. *See* Exec. Order No. 6156 at 1. The presumption of sound condition was established by the same

Executive Order, as were rebuttable presumptions relating to certain diseases and disabilities. The complicated schedule of rates for different disabilities and combinations of disabilities was also established by Executive Order No. 6156. *See id.* at 3-4. The Executive Order also addressed aggravation of preexisting injuries or diseases. On June 28, 1933, President Roosevelt issued Executive Order No. 6230. It dealt with claim forms, effective dates of awards, effective dates of reductions and discontinuances, and payment of certain accrued benefits upon death of a beneficiary. Perhaps most importantly, Executive Order No. 6230 created the procedure of filing appeals and created the Board of Veterans Appeals to hear them. All of these changes in 1933 greatly complicated the SCDD claims procedure. This new complexity, not created by Congress, was never considered by Congress when it re-enacted the fee limitation in 1936 or thereafter.

In 1957 the fee limitation was re-enacted once again merely as part of a recodification of existing veterans' law intended to "consolidate into one Act, and to simplify and make more uniform, the laws administered by the Veterans' Administration relating to compensation, pension, hospitalization, and burial benefits, and to consolidate into one Act the laws pertaining to the administration of the laws administered by the Veterans' Administration." Veterans' Benefit Act of 1957, Pub. L. No. 85-86, § 1604, 71 Stat. 83, 140. The fee limitation was neither mentioned in any committee report nor debated by Congress. It was simply subsumed as one part of the existing body of veterans' law consolidated by the legislation. The House Committee on Veterans' Affairs explained that, as the bill's title stated, the purpose of the statute was "[t]o consolidate into one act, and to simplify and make more uniform" existing law. H.R. Rep. No. 279, 85th Cong., 1st Sess., *reprinted in* 1957 U.S. Code Cong. & Ad. News 1214, 1214. The Committee did not mention the fee limitation in its explanation of the bill. Similarly, the Comptroller General stated that the purpose of the law was "to serve as a simplified restatement of existing law." *Id.* at 1224. Likewise, the Assistant Director of the Bureau of the Budget stated, "The intent of the bill is to simplify and embody in substance the existing provisions of law." *Id.* at 1240. The sole

reference to the fee limitation, in an attachment to the VA Administrator's statement, made clear that it was simply part of existing law and was not being reconsidered:

> The portion of this section which provides a penalty for one who "wrongfully withholds from any claimant or beneficiary any part of a benefit or claim allowed and due him" is apparently a restatement, in part, of section 202, Public No. 844, 74th Congress, which is not applicable to laws pertaining to Government life insurance.

Id. at 1237. The Senate Committee on Finance also reported on the bill. S. Rep. No. 332, 85th Cong., 1st Sess., *reprinted in* 1957 U.S. Code & Ad. News 1241. Its report also stated that the purpose of the act was "to consolidate into one act, and to simplify and make more uniform," existing law. *Id.* at 1241. Except for the lone reference of the VA Administrator, *id.* at 1253, the Senate Committee report did not mention the fee limitation either.

Finally, on September 2, 1958, Pub. L. No. 85-857, 72 Stat. 1105, was passed, which contains the fee limitation as it stands today. It maintained in section 784(g) a percentage allowance for litigated insurance cases. The act was entitled "An Act To consolidate into one Act all of the laws administered by the Veterans' Administration, and for other purposes." Like the 1957 legislation, it was simply another recodification of existing law. Again, the fee limitation was neither debated by Congress nor mentioned in any committee reports. It was simply subsumed as part of the existing body of veterans' law. The bill, H.R. 9700. was reported on by the Committee on Veterans Affairs. H.R. Rep. No. 1298, 85th Cong., 2d Sess., *reprinted in* 1958 U.S. Code Cong. & Ad. News 4352. The report explained that the bill "is basically a restatement of existing law." *Id.* at 4353. It did not mention the fee limitation. The bill was also reported on by the Senate Committee on Finance. S. Rep. No. 2259, 85th Cong., 2d Sess., *reprinted in* 1958 U.S. Code Cong. & Ad. News 4375. This report also stated that "[t]he bill is essentially a consolidation of all of the existing laws administered by the Veterans' Administration." *Id.* at 4375. It did not mention the fee limitation either.